Supreme Court, U.S.
FILED
OCT 14 2008
OFFICE OF THE CLERK

No. 08-___ 08-500

IN THE

United States Supreme Court

CYNTHIA LAMBERT,

Petitioner,

v.

GREG HARTMANN, Clerk of Courts for Hamilton County, and HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner filed a lawsuit under 42 U.S.C. § 1983 for violation of her right to privacy when a public official intentionally published her personal information, including her Social Security number and signature, on a publicly accessible government website. The publication of this personal information enabled thieves to steal Petitioner's identity, causing her economic harm and damaging her credit. The question is whether the Court of Appeals erred in concluding that Petitioner failed to state a claim for violation of her constitutional right to privacy merely because the economic harm resulting from the theft of her identity did not implicate a fundamental liberty interest?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, dated February 25, 2008, is reported at 517 F.3d 433, and is reproduced in the Appendix to this Petition (App.) at App. 1. The order of the Court of Appeals denying Petitioner's petition for rehearing en banc is reproduced at App. 41. The unreported opinion of the U.S. District Court for the Southern District of Ohio, dated December 29, 2006, is reproduced at App. 27.

STATEMENT OF JURISDICTION

The Court of Appeals entered an opinion on February 25, 2008, upholding the District Court's dismissal of Petitioners' complaint. A timely petition for rehearing en banc was denied on July 14, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Fourteenth Amendment provides in relevant part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person

within its jurisdiction the equal protection of the laws.

INTRODUCTION

Every year, millions of Americans fall victim to identity theft. Identity thieves steal billions in goods and services by gaining access to victims' personal information, particularly their Social Security numbers. After sapping their victims, sometimes for all they are worth, the thieves leave them to waste countless hours fighting bureaucracies to clean up the financial mess they find themselves in. This case is about whether a victim of identity theft has any remedy against a government official who feeds identity thieves a smorgasbord of personal information by intentionally posting it on the internet, fully aware of the devastating financial harm he could be causing.

Nearly 30 years ago, this Court recognized that the "interest in avoiding disclosure of personal matters" is inherent in an individual's right to privacy under substantive due process protections of the Fourteenth Amendment. *Whalen v. Roe*, 429 U.S. 589, 599, 603–04 (1977). Virtually every circuit to consider the question has applied this right to protect disclosure of such private information as medical records and financial information. In those circuits, a victim of identity theft would have a remedy against a governmental official who knowingly releases private financial information for public consumption.

The Sixth Circuit is the outlier. It refuses to protect an individual's privacy interest without a threshold showing that the violation implicates a fundamental liberty interest. In the Sixth Circuit, that threshold showing has been satisfied in only two instances: (1) where disclosure of personal information created a potential threat of bodily harm; and (2) where the information disclosed was of a sexual and humiliating nature. In this one circuit, government-facilitated financial ruin does not count as constitutionally relevant harm.

The Sixth Circuit's rule is inconsistent with this Court's approach of balancing the informational privacy interest at stake with the state's need for disclosure of the private information. *See Whalen*, 429 U.S. at 603–04; *Nixon v. Administrator of General Services*, 433 U.S. 425, 458 (1977). The result is stark: Victims of government-facilitated identity theft in the Sixth Circuit lack a remedy for gross abuses and devastating harm, whereas their counterparts in other circuits have a remedy. The confusion and disuniformity will persist unless this Court intervenes to declare a uniform approach to informational privacy claims.

STATEMENT

A Government Official Intentionally Disseminates Thousands of Social Security Numbers

Respondent Greg Hartmann, the Clerk of Courts for Hamilton County, Ohio, put hundreds of thousands of citizens at grave risk of identity

theft. At public expense, he maintained a website on which he published traffic citations. App. 28. His website permitted unfettered and anonymous public access to the name, address, date of birth, Social Security number, driver's license number, physical description, and signature of every driver who received a citation. App. 4. The information posted on each individual was more than enough to secure a drivers license, open a credit card account, and even apply for a loan. It was a veritable treasure trove for identity thieves, who could either use the information themselves or compile it and sell it on the black market.

According to the website itself, Mr. Hartmann's office processed about 50,000 traffic citations a year. CA App. 113.[1] When this lawsuit was filed, the website laid bare the personal information of individuals gathered from over 300,000 traffic citations. CA App. 76.

Mr. Hartmann was fully aware of the dangers of posting such vital personal data on the web. As early as July 2002, an identity thief pled guilty to running up $11,000 in charges in other people's names by tapping into information obtained from Mr. Hartmann's website. CA App. 131. That same year, a *New York Times* article reported about an individual whose identity had been stolen using a traffic citation obtained on

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[1] References to CA App. refer to the Appendix filed in the Court of Appeals for the Sixth Circuit.

Mr. Hartmann's website. CA App. 128. Mr. Hartmann also received several warnings in 2003 that the website was placing thousands of drivers at risk of identity theft. CA App. 287–90. Despite the warnings, Mr. Hartmann continued to post the sensitive personal financial information.

Using the Website, a Thief Steals Ms. Lambert's Identity and Hundreds of Others

Predictably, there were more casualties of Mr. Hartmann's recalcitrance. Petitioner Cynthia Lambert was one of them. In September 2004, Ms. Lambert was notified of suspicious activity on her Sam's Club and Home Depot credit accounts. App. 28. A thief made over $20,000 in unauthorized purchases using Ms. Lambert's identity. *Id.* The theft dealt a significant blow to Ms. Lambert's sterling credit. App. 29. Ms. Lambert had to invest substantial amounts of time, money, and energy to restoring her credit and safeguarding her identity from future theft. CA App. 115.

Ms. Lambert alerted Mr. Hartmann's office that her identity had been stolen using personal information obtained from his website. App. 4. The source of information was obvious from the start, because Mr. Hartmann's website incorrectly reported Ms. Lambert's driver's license number, and the thief used that same incorrect number in the scam. *Id.* Mr. Hartmann's office dismissed the concerns, insisting that it would be too time consuming and expensive to remove the citations from the website. *Id.*

The police eventually caught the culprit, an identity thief named Traci Southerland. App. 4–5. In pleading guilty, she confirmed that she ran a ring of identity thieves who mined Mr. Hartmann's website for information that would allow them to pose as others. *Id.* They stole the identities of hundreds of individuals and accrued unauthorized charges totaling over $450,000. CA App. 521. The ringleader was sentenced to 139 months. App. 5.

The District Court Dismisses Ms. Lambert's Privacy Claim

Ms. Lambert filed a complaint under 42 U.S.C. § 1983 asserting that Mr. Hartmann violated her right to privacy when he published her Social Security number and other personal information on his website. App. 31. The District Court dismissed Ms. Lambert's complaint for failure to state a claim. App. 38–39.

In doing so, the District Court acknowledged this Court's opinions in *Whalen* and *Nixon*, setting forth a balancing test to determine whether an individual's right to privacy had been violated. App. 33–34. These precedents would have required that the District Court (1) consider whether Ms. Lambert's expectation of privacy was reasonable and then (2) balance her right to informational privacy against the governmental interest in disclosing the personal information at issue. *Id.*

But the District Court felt constrained by Sixth Circuit precedent narrowly construing this

Court's precedent. App. 34–35. The District Court followed the Sixth Circuit's rule that that an individual's "right to privacy is triggered only when the interest at stake concerns 'those personal rights that can be deemed fundamental or implicit in the concept of ordered liberty.'" *Id.* (quoting *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981)). Specifically, the District Court outlined the Sixth Circuit's test for analyzing informational privacy claims as follows: "(1) the interest at stake must implicate either a fundamental right or one implicit in the concept of ordered liberty; and (2) the government's interest in disseminating the information must be balanced against the individual's interest in keeping the information private." App. 36 (citing *Bloch v. Ribar*, 156 F.3d 673, 684 (6th Cir. 1998)).

The District Court concluded that, under Sixth Circuit precedent, the only information that would satisfy the first prong of the two-step analysis was information that could create a threat of bodily integrity (e.g., disclosure of the addresses, phone numbers, driver's license and family information of undercover police officers to defendants) and the public disclosure of the details of a rape. App. 36–38 (discussing *Bloch v. Ribar*, 156 F.3d 673 (6th Cir. 1998), and *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998)). Against this backdrop, the District Court found that Ms. Lambert had not met the burden of pleading a violation of a right to informational privacy on the basis of allegations that she had suffered damage to her credit and

financial harm. App. 38–39.

The Court of Appeals Affirms

The Court of Appeals affirmed the dismissal of Ms. Lambert's complaint. Echoing the District Court, the Sixth Circuit acknowledged that, "in contrast to some of [its] sister circuits, [it] 'has narrowly construed the holdings of *Whalen* and *Nixon* to extend the right to informational privacy only to interests that implicate a fundamental liberty interest.'" App. 14 (quoting *Bloch*, 156 F.3d at 684). The Court of Appeals further acknowledged that it had found a fundamental liberty interest to apply only in the same two narrow contexts that the District Court outlined—(1) where the information released could lead to bodily harm; and (2) where the disclosed information was of a sexual and humiliating nature. *Id.*

While the Court of Appeals acknowledged that Congress and nearly every other circuit court has recognized a privacy interest in one's Social Security number, App. 19 (citing the Privacy Act of 1974, 5 U.S.C. § 552a), it was not persuaded that Mr. Hartmann's intentional disclosure of this information rose to the level of implicating a fundamental liberty interest. First, the Court of Appeals found that disclosure of Ms. Lambert's Social Security number and other personal information did not threaten her personal security because its disclosure did not create a serious threat of bodily harm. App. 21 (citing *Kallstrom*, 136 F.3d at 1064). It also rejected the argument that the disclosure led to

reputational injury, a fundamental liberty interest, despite the damage to Ms. Lambert's creditworthiness. App. 22. The Court of Appeals then concluded that "protection of a person's credit is a concept relating to one's finances and economic well-being, one that by its very nature bears no relationship to the kinds of interests that are 'implicit in the concept of ordered liberty.'" App. 23 (quoting *Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 575 (6th Cir. 2002)).

The Court of Appeals declined to rehear this case en banc. App. 41.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari for three reasons. First, the Sixth Circuit deepened an existing split among the circuits over whether a plaintiff must meet a threshold showing that a fundamental liberty interest underlies her claim before proceeding to the balancing test set forth by this Court in *Whalen* and *Nixon*. Second, this case presents an issue of profound national importance. Third, the Sixth Circuit's approach is at odds with this Court's precedent.

I. THE CIRCUITS ARE SPLIT OVER THE ELEMENTS OF AN INFORMATIONAL PRIVACY CLAIM.

In keeping with this Court's precedents, all courts of appeals agree that Fourteenth Amendment substantive due process protection extends to two types of privacy interests. The first is "independence in making certain kinds of impor-

tant decisions"; the second is the informational privacy interest at issue in this case, the "interest in avoiding disclosure of personal matters." *E.g.*, App. 13 (citing *Whalen v. Roe*, 429 U.S. 589, 599, 603–04 (1977)); *Tucson Women's Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004); *Alexander v. Peffer*, 993 F.3d 1348 (8th Cir. 2002); *Denius v. Dunlap*, 209 F.3d 944 (7th Cir. 2000); *Sheets v. Salt Lake City*, 45 F.3d 1383 (10th Cir. 1995); *Doe v. City of New York*, 15 F.3d 264 (2d Cir. 1994); *James v. City of Douglas*, 941 F.3d 1539 (11th Cir. 1991); *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990); *Fraternal Order of Police v. City of Philadelphia*, 821 F.2d 105 (3d Cir. 1987).

The circuits are hopelessly split, however, on the scope of the latter category, the informational privacy interest. Eight circuits recognize that a plaintiff can claim a federal right to privacy concerning personal information without any further showing that the information implicates a fundamental liberty interest. *See infra* Point I.A. The Sixth Circuit defies the weight of authority by engrafting such a threshold requirement. *See infra* Point I.B. The split is acknowledged, entrenched, and intractable. Only this Court can resolve the split.

A. Eight Circuits Recognize a Right to Privacy with Regard to Personal Information Without a Threshold Showing of an Underlying Fundamental Liberty Interest.

Eight circuits—the Second, Third, Fourth,

Seventh, Eighth, Ninth, Tenth, and Eleventh—recognize that a plaintiff can claim a federal right to privacy concerning personal information without any further showing that the information implicates a fundamental liberty interest. *See Tucson Woman's Clinic*, 379 F.3d at 551; *Alexander*, 993 F.3d at 1350; *Denius*, 209 F.3d at 957; *Sheets*, 45 F.3d at 1388; *Doe*, 15 F.3d at 267; *James*, 941 F.3d at 1544; *Walls*, 895 F.2d at 192; *Fraternal Order of Police*, 821 F.2d at 109.

When an individual claims that a governmental entity has violated her right to privacy by disclosing personal matters, these circuits apply the balancing test this Court set forth in *Whalen* and *Nixon*. *See, e.g.*, *Tucson Women's Clinic*, 379 F.3d at 551; *Denius*, 209 F.3d at 956; *Sheets*, 45 F.3d at 1388–89; *James*, 941 F.3d at 1544; *Walls*, 895 F.2d at 192; *Fraternal Order of Police*, 821 F.2d at 112; *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983). As a first step in evaluating whether a claimant has a right to privacy over the confidential information at issue, the circuits examine whether the claimant had a reasonable expectation of privacy in that information. "The more intimate or personal the information, the more justified is the expectation that it will not be subject to public scrutiny." *Walls*, 895 F.2d at 192 (citing *Fraternal Order of Police*, 812 F.2d at 112–13).

Many cases in this context concern an individual's right to privacy in his or her medical records. *See, e.g.*, *Tucson Women's Clinic*, 379 F.3d at 551; *Denius*, 209 F.3d at 956–57; *Fraternal*

Order of Police, 821 F.2d at 112–15; *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980). It is widely accepted among the eight circuits recognizing a right to privacy in personal information that an individual has a reasonable expectation of privacy in such medical information. Indeed, even this Court has recognized as much. *Whalen*, 429 U.S. at 599–600. All eight circuits have further recognized that parties have a reasonable expectation of privacy in, and thus a constitutionally protected privacy interest with respect to, personal financial information. *See, e.g.*, *Sheets*, 45 F.3d at 1388 (finding a protected privacy interest in matters concerning "marriage, finances and business"); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (noting the Second Circuit's recognition of the right to confidentiality in "the context of financial disclosure"); *Alexander*, 993 F.2d at 1348 (acknowledging a privacy interest in "highly personal . . . financial information"); *Walls*, 895 F.2d at 194 (same); *Fraternal Order of Police*, 812 F.2d at 115 (same); *Plante v. Gonzalez*, 575 F.2d 1119, 1135 (5th Cir. 1978) (recognizing a "substantial" privacy interest in personal financial information); *James*, 941 F.2d at 1543 n.7 (noting Fifth Circuit precedent finding a right to privacy in confidential financial information as binding). As the Seventh Circuit has noted, "[b]ecause confidential financial information may implicate substantial privacy concerns and impact other fundamental rights, we agree with the overwhelming majority of our sister circuits that some types of financial infor-

mation involve the degree and kind of confidentiality that is entitled to a measure of protection under the federal constitutional right of privacy." *Denius*, 209 F.3d at 958.

In these circuits, once a court determines that the claimant has a reasonable expectation of privacy in the personal information she seeks to protect, it balances that interest against whether the state has a compelling state interest in making or requesting the disclosure of that information. *See, e.g., James*, 941 F.3d at 1544; *Walls*, 895 F.2d at 192; *Fraternal Order of Police*, 821 F.2d at 112; *Barry*, 712 F.2d at 1559. Most circuits take the extra step of examining whether the state has taken adequate measures to protect the claimant's private information and to ensure that it is not disseminated for any other unrelated purposes. *See Tucson Woman's Clinic*, 379 F.3d at 551; *Walls*, 895 F.2d at 194; *Flanagan v. Munger*, 890 F.2d 1557, 1570 (10th Cir. 1989); *Westinghouse*, 638 F.2d at 579–80 (3d Cir. 1980). Many circuits have adopted a more particularized balancing test that takes into account several factors in determining whether an individual's right to privacy has been violated. Some circuits have broken down the factors as follows:

> 1) the type of record requested; 2) the information it does or might contain; 3) the potential for harm in any subsequent nonconsensual disclosure; 4) the injury from disclosure to the relationship in which the record was generated; 5) the

> adequacy of safeguards to prevent unauthorized disclosure; 6) the degree of need for access; 7) whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.

Denius, 209 F.3d at 956 n.7 (citing *In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999)) (internal quotations omitted).

None of these circuits require a party to demonstrate that the claimed right to privacy implicates a fundamental liberty interest. In fact, some of them have explicitly considered, and rejected, such a requirement. *See, e.g.*, *Denius*, 209 F.3d at 957 (expressly rejecting the Sixth Circuit's approach and noting that the majority of circuits agree that *Whalen* and *Nixon* established a federal right of informational privacy); *Barry*, 712 F.2d at 1559 (identifying the Sixth Circuit as one of the only circuits that do not recognize a general right to nondisclosure of personal information against which infringing government actions are balanced).

B. The Sixth Circuit's Opinion Deepens an Existing Split.

The Sixth Circuit's rule stands in stark conflict to this overwhelming authority. In the Sixth Circuit, unlike in these eight circuits, it is not enough for a plaintiff to demonstrate that she had a reasonable expectation of privacy in the information she seeks to protect. The plaintiff must also show that her claimed privacy in-

terest implicates "a right that is either 'fundamental' or 'implicit in the concept of ordered liberty.'" App. 19 (quoting *Bloch v. Ribar*, 156 F.3d 673, 684 (6th Cir. 1988). Consequently, the Sixth Circuit has found that a right to privacy extends only to two narrow classes of personal information: (1) information that, if disclosed, could create a threat to bodily integrity, and (2) information of a sexual and humiliating nature. *See Bloch v. Ribar*, 156 F.3d 673, 673 (6th Cir. 1998); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1055 (6th Cir. 1998).

This focus on the result of disclosure, rather than the private nature of the personal information at stake, means that the Sixth Circuit, unlike its sister circuits, will simply not recognize a right to privacy in any financial information. *See Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 575 (6th Cir. 2000) (declining to find a policy mandating the disclosure of real estate holdings to violate the right to privacy because "[t]he privacy interest one may have in one's personal finances . . . is far afield from [the] intimate concerns" recognized as fundamental privacy interests). Thus, in this case, because Ms. Lambert could not demonstrate that the disclosure of her Social Security number and other personal information implicated a fundamental liberty interest, the court refused to balance the interest in protecting that information against the Clerk of Court's interest in disclosing it in perhaps the most public of forums—the internet.

While no other circuit requires such an onerous showing before proceeding to the balancing test, at least one other circuit seems poised to follow the Sixth Circuit's lead. The First Circuit has analyzed this circuit split in the context of determining whether a governmental official violated "well established" constitutional rights when disclosing certain psychiatric records. *See Borucki v. Ryan*, 827 F.2d 836, 841–42 (1st Cir. 1987). Because of the posture of the case, the First Circuit did not have to resolve definitively whether the right to informational privacy required a showing that a fundamental liberty interest was at stake. But in ruling that there was no "well established" right to privacy in that context, the court drew heavily from the Sixth Circuit's approach to informational privacy cases—suggesting that if given the opportunity, the First Circuit might well follow the Sixth.[2]

* * *

This circuit conflict is entrenched and intractable. As noted above, some circuits that espouse the majority position have considered and rejected the Sixth Circuit's approach. *See supra* at 14. Conversely, since 1981, the Sixth Circuit has acknowledged this Court's balancing test and the majority rule, but declined to follow ei-

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[2] The D.C. Circuit has also noted the conflict but has declined to take a position. *See, e.g., Am. Fed'n of Gov't Employees v. HUD*, 118 F.3d 786, 791–92 (D.C. Cir. 1997).

ther. *See J.P. v. DeSanti*, 653 F.2d 1080, 1088–89 (6th Cir. 1981). The Sixth Circuit has hardened its position in a series of opinions—almost all unanimous. *See Barber v. Overton*, 496 F.3d 449, 456–57 (6th Cir. 2007); *Overstreet*, 305 F.3d at 575; *Bloch*, 156 F.3d at 684; *Kallstrom*, 136 F.3d at 1064. And in denying rehearing en banc, the Sixth Circuit has confirmed that it has no interest in reconsidering its longstanding position. Only this Court's intervention will resolve the conflict.

II. THIS CASE PRESENTS AN ISSUE OF NATIONAL IMPORTANCE IN LIGHT OF THE NATIONAL SCOURGE OF IDENTITY THEFT.

There are 8.3 million Cynthia Lamberts every year. Federal Trade Commission, *2006 Identity Theft Survey Report* 4 (2007), *available at* http://www.ftc.gove/os/2007/11/SynovateFinalReportIDTheft2006.pdf. Identity thieves inflict about $15.6 billion in financial damage per year, not just on consumers, but on creditors and retail establishments. *Id.* at 9. That does not account for the immense time and effort the victims expend in fending off angry creditors, responding to investigations, and cleaning up besmirched credit ratings. *Id.* at 39–42. Identity theft is one of the fastest growing crimes in the United States. Social Security Administration, *Identity Theft and Your Social Security Number* 2 (2007), *available at* http://www.ssa.gov/pubs/10064.pdf. That stands to reason, for the marks are so easy, the potential payload is so high, the

crime is so risk-free, and the chances of getting caught are so slim. *See* Chris Jay Hoofnagle, *Identity Theft: Making the Known Unknowns Known*, 21 Harv. J.L. & Tech. 97, 107–08 (2007) (estimating that identity thieves have only a one in 700 chance of getting caught).

Because the stakes are so high, and the potential harm so ruinous, consumer organizations, banks, and state and federal governments have made it a priority to alert consumers to the need to safeguard their private financial information. *See e.g.*, Federal Trade Commission, *Deter Detect Defend, Avoid ID Theft* (2006), *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/idtheft/idt01.pdf. A whole new industry has emerged in recent years to protect consumers from identity theft. Federal Trade Commission, *To Buy or Not to Buy: Identity Theft Spawns New Products and Services to Help Minimize Risk* (2007), *available at* http://www.ftc.gov/bcp/edu/pubs/consumer/idtheft/idt05.pdf. These authorities all underscore just how critical it is for consumers to maintain the confidentiality of their Social Security numbers. For an identity thief, a Social Security number represents the keys to the kingdom. Armed with that one piece of information, an identity thief can locate everything he needs to obtain a state ID card or drivers license, open credit card accounts, apply for loans, set up telephone service, and obtain medical and auto insurance. *Preserving the Integrity of Social Security Numbers and Preventing their Misuse by Terrorists and Identity Thieves: Hearing Before the Subcomm. on Social Security of*

the H. Ways and Means Comm., 107th Cong. (2002) (testimony of Grant D. Ashley), *available at* http://www.fbi.gov/congress/congress02/ashley091502.htm. In short, a Social Security number is all a thief needs to completely swipe an identity. *Id.*

All the warnings, all the precautions, and all the sophisticated security systems are for naught, if government officials feel free to post the secret information publicly for all to see. Governmental units have more secret financial information on more citizens than anyone else. A single inept government official has the power to wreak havoc with the finances and security of thousands of consumers.

That is why this case presents an issue of national importance. The premise of liability under § 1983 is that governmental officials like Mr. Hartmann respond to tort incentives. *See Owen v. City of Independence*, 445 U.S. 622, 651–52 (1980) (stating that the specter of § 1983 liability for injurious conduct "should create an incentive for officials . . . to err on the side of protecting citizens' constitutional rights"). They are more likely to respect constitutional rights—and less likely to conclude, as Mr. Hartmann did, that it is not worth the expense or the bother—if they face the prospect of being held accountable.

But, of course, the § 1983 incentives will serve this intended function only to the extent that the courts treat the privacy right at issue as a right of constitutional dimension. The answer to the question presented will affect whether

government officials safeguard the secret information they are entrusted with or, like Mr. Hartmann, expose hundreds of thousands of citizens to the real possibility of financial ruin.

III. THE SIXTH CIRCUIT'S HOLDING IS WRONG.

This Court should also grant certiorari because the rule followed by the Sixth Circuit is wrong.

First, the Sixth Circuit's rule is inconsistent with this Court's jurisprudence. Justice Brandeis described the right to protect one's thoughts, beliefs, and emotions from governmental intrusion as "the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting). In *Whalen v. Roe*, this Court looked to Justice Brandeis' opinion in finding a constitutionally protected "zone of privacy" with respect to the "individual interest in avoiding disclosure of personal matters." 429 U.S. at 598–99 & n.25. Four months later, this Court reaffirmed the right to protect private information in *Nixon v. Administrator of General Services*. 433 U.S. at 457–58. In requiring a threshold showing of an underlying fundamental liberty interest as a prerequisite to pleading a violation of informational privacy, the Sixth Circuit has put itself at odds with this Court's 30-year-old precedent.

In *Whalen*, this Court identified the individ-

ual interest in avoiding disclosure of personal matters. 429 U.S. at 599. In that case, physicians and patients had brought an action challenging the constitutionality of a New York statute requiring disclosure of every prescription of a certain class of drugs. The patients argued that the statute violated their privacy interest in avoiding disclosure of personal matters because, if information regarding their prescriptions became publicly known, it could adversely impact their reputations, and thus make them reluctant to use the drugs. *See id.* at 600. Without any threshold consideration of whether a fundamental liberty interest was implicated, this Court weighed the totality of the circumstances—i.e., the patient's expectation of privacy in the prescription information; the number and nature of the individuals who would have access to the information; the extent to which the information would be protected; and the state's need for disclosure. *See id.* at 600–03. This Court ultimately held that the disclosure was limited to individuals who would typically have access to prescription information, and that adequate safeguards existed to protect the information. *Id.* at 601–02. As a result, it found that the statute did not violate the patients' right to privacy. *Id.* at 603–04.

In *Nixon*, this Court gave form to *Whalen*'s principles, by balancing competing interests to determine the constitutionality of legislation requiring President Nixon to disclose his presidential records to the Administrator of General Services for safekeeping. Once again, this Court

recognized the right to privacy in "avoiding disclosure of personal matters." 433 U.S. at 457 (quoting *Whalen*, 429 U.S. at 599). Its analysis did not require a threshold consideration of whether a fundamental liberty interest was implicated. *Id.* Instead, this Court's balancing test examined: (1) whether the "pattern of de facto Presidential control and congressional acquiescence gave rise to [President Nixon's] legitimate expectation of privacy in" his presidential records; (2) the nature and quantity of the personal, private information present in the files; (3) the important public interest in preserving access to his Presidential files; and (4) the limited number of individuals who would have access to the files. *Id.* at 457–65. This Court ultimately upheld the law. *Id.* at 465.

The Sixth Circuit was simply wrong when it opined that "*Whalen* and *Nixon* . . . extend the right to informational privacy only to interests that implicate a fundamental liberty interest." App. 14 (internal quotations omitted); *see DeSanti*, 653 F.2d at 1090 (articulating same point). The Sixth Circuit derived the notion from dicta from an opinion decided a year before *Whalen* and *Nixon*—*Paul v. Davis*, 424 U.S. 693 (1977)—in which this Court considered whether individuals had a constitutionally protected right that would prevent a state from "publiciz[ing] the record of an official act such as an arrest." *Id.* at 713. This Court, in dicta, stated that the right to "personal privacy must be limited to those [rights] which are 'fundamental' or 'implicit in the concept of ordered liberty.'" *Id.*

However, when confronted with the same issues a year later in *Whalen* and *Nixon*, this Court made no mention of any threshold requirement of showing an underlying "fundamental liberty interest." Indeed, this standard has never appeared anywhere else in this Court's jurisprudence.

Second, the Sixth Circuit's rule incorrectly focuses on the *effect* of the disclosure rather than on the private nature of the information being disclosed. In keeping with Supreme Court precedent, the majority approach focuses on the information itself, and asks whether a reasonable person would expect the information to be kept private. The answer to that question should depend, as it does in most circuits, upon the nature of the information disclosed. It should not depend, as it does in the Sixth Circuit, upon the nature of the harm inflicted. If information is private, it should be kept private, and the right to keep it private should not depend upon whether the harm from its dissemination is classified as reputational or bodily harm, on the one hand, or, financial harm, on the other hand.

Third, the Sixth Circuit's misplaced focus on the nature of the harm is confusing and unworkable. There is no better illustration of the confusion than the unpredictable and inconsistent rulings that have come out of the Sixth Circuit, even in the narrow circumstances where it recognizes a right to informational privacy. For example, the Sixth Circuit has reached

irreconcilable conclusions over when release of the same information could lead to bodily harm. In the Sixth Circuit, the disclosure of police officers' addresses and family information to defense attorneys of gang members "encroached upon [the officers'] fundamental rights to privacy," *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1069–70 (6th Cir. 1998), but the disclosure of corrections officers' social security numbers and dates of birth (which prisoners' used to locate the corrections officers home addresses and family information), did not implicate a fundamental right to privacy *Barber v. Overton*, 496 F.3d 449, 456–57 (6th Cir. 2007)).

The Sixth Circuit's rule has led to a similar conflict over when the information of a sexual and humiliating nature is actionable. On the one hand, the release by a county sheriff of a rape victim's identity, and the embarrassing details of her rape, implicates the fundamental right to privacy. *Bloch v. Ribar*, 156 F.3d 673, 685–86 (6th Cir. 1998)). On the other hand, the release of juveniles' social histories, including the details of their sexual and physical abuse, does not. *See J.P. v. DeSanti*, 653 F.2d 1080, 1088 (6th Cir. 1981). These inconsistencies are not attributable to a nuanced parsing of facts. They are the product of the fundamental incoherence of the Sixth Circuit's legal standard.

This Court should intervene to announce a coherent rule that is more consistent with its prior precedents.

CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CYNTHIA LAMBERT,
Plaintiff-Appellant,

v.

GREG HARTMAN, in his official capacity as Clerk of Courts, and HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS,
Defendants-Appellees.

No. 07-3154

OPINION

Appeal from the United States District Court
for the Southern District of Ohio
No. 04-00837—Michael H. Watson, J., Presiding

Argued: January 30, 2008

Decided and Filed: February 25, 2008

Before GUY, GILMAN, and McKEAGUE,
Circuit Judges.

COUNSEL

ARGUED: Marc D. Mezibov, LAW OFFICES OF MARC MEZIBOV, Cincinnati, Ohio, for Appellant. Pamela J. Sears, HAMILTON COUNTY PROSECUTOR'S OFFICE, Cincinnati, Ohio, for Appellees.

ON BRIEF: Marc D. Mezibov, Christian A. Jenkins, Stacy Ann Hinners, LAW OFFICES OF MARC MEZIBOV, Cincinnati, Ohio, for Appellant. Pamela J. Sears, Michael G. Florez, HAMILTON COUNTY PROSECUTOR'S OFFICE, Cincinnati, Ohio, for Appellees.

OPINION

RONALD LEE GILMAN, Circuit Judge.

Cynthia Lambert appeals the district court's dismissal of her complaint against Greg Hartmann in his official capacity as the Hamilton County Clerk of Courts (the "Clerk") and against the Hamilton County Board of County Commissioners (the "County") (collectively the "Defendants"). In September of 2003, Lambert received a traffic citation for speeding. She later discovered that this citation, which contained personal identifying information (including her Social Security number), had been published on the Clerk's public website.

Lambert sued the Defendants pursuant to 42 U.S.C. § 1983, claiming that the publication of the

citation violated her constitutional right to privacy under the Fourteenth Amendment to the U.S. Constitution. She further asserted that her identity had been stolen by a third party as a direct result of the Clerk's publication of the citation, and that she had consequently suffered economic damages, damage to her personal credit rating, and damage to her reputation. Lambert also raised state-law claims and sought to certify her complaint as a class action.

The Defendants moved to dismiss Lambert's complaint on the basis that she had failed to state a claim under § 1983. Concluding that Lambert's § 1983 claim must fail because her alleged privacy interest was not of a constitutional dimension, the district court granted the Defendants' motion. The court then dismissed her pendent state-law claims without prejudice. Lambert argues that the court erred in dismissing her complaint and renews her claim that the Defendants violated her constitutional right to privacy. For the reasons set forth below, we AFFIRM the judgment of the district court.

I. BACKGROUND

A. Factual background

In September of 2003, Lambert received a traffic citation for speeding in Hamilton County, Ohio. The issuing officer completed an Ohio Uniform Traffic Ticket, a form used throughout Ohio that includes a person's name, signature, home address, birth date, driver's license number, and Social Security number. One copy of the citation was given to Lambert and another was filed with the Clerk's Office. Approximately a year after she received the citation, Lam-

bert was contacted by two retail stores about suspicious purchases that had been made in her name. The individual who made the purchases presented a driver's license that displayed Lambert's full name, home address, birth date, driver's license number, and Social Security number.

During her conversations with the retailers, Lambert was informed that the identity thief might have gained access to her personal information through the Clerk's website. Lambert then looked on the internet and discovered that the Clerk's publicly accessible site made it possible to search and locate traffic citations that retained all of an individual's identifying information, including his or her Social Security number. When Lambert examined her citation on the website, she realized that, like the fake identification used by the identity thief, the citation contained a driver's license number that was incorrect by one digit. Lambert promptly called the Clerk's Office to complain about the publication of her personal information. The Clerk's Office refused to remove the information, explaining to Lambert that the records were made public for the convenience of the parties and that to remove the records "would require vast amounts of manpower."

Lambert filed suit against the Defendants in December of 2004. By that time, law enforcement officials had apprehended a group of individuals who had gained access to the personal information of numerous people found on the Clerk's website and had used that information to commit identity theft. The police informed Lambert that they had arrested a person who was a part of that ring, a woman who later admitted that she was the thief who stole Lam-

bert's identity from the Clerk's website. That woman was later charged with a conspiracy to commit identity theft, convicted, and sentenced to 139 months' imprisonment for her actions.

B. Procedural background

Lambert's claim under 42 U.S.C. § 1983 alleged that the Clerk's policy and practice of publishing personal information on a public website violated her Fourteenth Amendment right to privacy, in addition to her Fourth Amendment right to be free from unreasonable searches and seizures, and her Fourteenth Amendment rights to substantive and procedural due process. She contended that, as a result of the Clerk's policy, she had suffered "economic damages, damages to her personal credit rating, and damage to her reputation." Lambert also raised claims under the common law of Ohio for violation of her right to privacy and the tort of publication of private facts. Finally, she requested the certification of a class action under Rule 23 of the Federal Rules of Civil Procedure on behalf of a putative class of "hundreds of thousands" of people whose Social Security numbers had been published on the Clerk's website.

Lambert originally sought declaratory relief, compensatory damages, and an injunction to prevent the publication of the personal information in question. She later sought leave to amend her complaint, removing her demand for compensatory damages and substituting instead a request for "uniform, class-wide relief in the form of a credit monitoring fund or other prophylactic measure to detect or prevent potential identity theft."

The Defendants moved to dismiss Lambert's complaint, arguing, among other things, that she had failed to state a claim upon which relief could be granted. In December of 2006, the district court entered an order granting the Defendants' motion and dismissing all of Lambert's claims. The court reviewed Sixth Circuit precedent addressing the constitutional right to privacy of personal information and concluded that Lambert's claim was without merit because the privacy interest she asserted did "not implicate either a fundamental right or one implicit in the concept of ordered liberty." Noting that Lambert identified only a "risk of financial harm," the court determined that this injury "bears no equivalence to the potential and actual harm" suffered by the plaintiffs in cases where the Sixth Circuit has recognized a Fourteenth Amendment right to privacy against the disclosure of personal information. The district court therefore agreed with the Defendants that Lambert's claim failed to state a claim under 42 U.S.C. § 1983, concluded that a ruling on her proposed amended complaint was unnecessary, and declined to exercise supplemental jurisdiction over her state-law claims. This timely appeal followed.

II. ANALYSIS

A. Standing

The Defendants assert that because Lambert is no longer seeking compensatory damages and "limits her remedy to credit monitoring relief," she does not have standing to bring her claim. Their contention on this point is somewhat confusing, interchangeably arguing that Lambert's injury is not fairly traceable

to the publication of her Social Security number and that "the injury of identity theft in the future is too speculative and conjectural to entitle her to [credit-monitoring] relief." Lambert has failed to address the Defendants' challenge, but we nevertheless conclude that she has standing to bring her claim.

To bring a claim in federal court, a plaintiff "must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). This burden can be met by Lambert showing that "(1) [she] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2)[her] injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that [her] injury will be redressed by a favorable decision." *See Daubenmire v. City of Columbus*, 507 F.3d 383, 388 (6th Cir. 2007) (internal quotation marks omitted).

Lambert has alleged that her identity was stolen and that her financial security and credit rating suffered as a result. She also claims that because of the nature of identity theft, she has been exposed to the risk that people have accessed her personal information on the internet and will be able to use that information to commit future acts of identity theft against her. Although this latter injury is somewhat "hypothetical" and "conjectural," her actual financial injuries are sufficient to meet the injury-in-fact requirement. *See Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby, Mich.*, 470 F.3d 286, 294 (6th Cir. 2006) (noting that "[t]his Court has ex-

plicitly held that" certain types of economic injuries are sufficient to confer standing).

Indeed, the Defendants do not dispute that Lambert has been injured. They instead attack her standing on the basis that her injuries are not fairly traceable to the Clerk's website. Specifically, they argue that the harm suffered by Lambert was caused by an intervening act-the criminal act of a third party. They therefore claim that Lambert has not met the second prong of the standing test because she is unable to demonstrate that her injuries are fairly traceable to the Defendants.

The Defendants are correct in pointing out that a third party was undoubtedly the direct cause of Lambert's injuries. But because both the traffic citation and the fake identification used to make purchases in Lambert's name contained the identical, incorrect driver's license number, Lambert was able to link the act of identity theft to the personal information that was made available by the Clerk. Moreover, the identity thief (who was indicted and convicted before the district court dismissed Lambert's case) acknowledged that she had taken Lambert's personal information from the Clerk's website. Lambert thus alleged sufficient facts to show that her injuries were fairly traceable to the publication of her personal information by the Clerk. *See Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 261 (1977) (explaining that the cause of the plaintiff's asserted injury may be indirect so long as the complaint indicates "that the injury is indeed fairly traceable to the defendant's acts or omissions").

The Defendants also challenge the relief sought by Lambert. They argue that the credit-monitoring fund requested by Lambert would remedy neither her past injury of "publication" nor her potential injury of "future identity theft." The Defendants cite a number of cases that, according to their interpretation, support the contention that Lambert does not have standing. But only one of these cases even addresses standing, and in that case the Sixth Circuit concluded that the plaintiff had pled facts sufficient to confer standing. *See Sutton v. St. Jude Medical S.C., Inc.*, 419 F.3d 568, 575 (6th Cir. 2005) (concluding that the plaintiff had standing to seek medical testing and monitoring allegedly made necessary by the increased risk of future harm created by a heart-valve implant).

Indeed, the Defendants mischaracterize both the injury that Lambert has alleged and the nature of the relief that she seeks. Lambert claims that the past identity theft has damaged her credit rating and that the publication of her personal information has exposed her to a risk of future identity theft. This court's decision in *Sutton* undermines, rather than supports, the Defendants' contention that a monitoring fund would not redress these injuries. We explained in *Sutton* that if the plaintiff could prove that the implanted heart valve had increased the future risk to his health, "medical monitoring [would] undoubtedly help to remedy the situation." *Id.* Likewise, if Lambert were able to prove that she continues to face an increased risk of identity theft, she could likely show that monitoring suspicious activity on her credit report would not only combat that future risk, but would also help to redress the

past financial injury that she has suffered. For these reasons, we conclude that Lambert has standing to bring her claims.

B. Immunity claims

The Defendants also raise a number of immunity defenses as an alternative ground for rejecting Lambert's claims. Although Lambert acknowledges that her opponents raised these claims before the district court and on appeal, she declined to address them in either of her briefs or during oral argument. The district court likewise declined to consider any of these arguments, resting its dismissal of Lambert's claims on the merits. Because we agree with the district court's disposition of this case on the merits, we similarly see no need to address the Defendants' immunity arguments. *See, e.g., Nair v. Oakland County Cmty. Mental Health Auth.*, 443 F.3d 469, 477 (6th Cir. 2006) (explaining that where, as here, a defendant declines to raise Eleventh Amendment immunity as a threshold defense, "federal courts have discretion to address the sovereign-immunity defense and the merits in whichever order they prefer").

C. Lambert's § 1983 claim

1. Standard of review

We review de novo the district court's decision to grant a defendant's motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Dubay v. Wells*, 506 F.3d 422, 427 (6th Cir. 2007). "A motion to dismiss for failure to state a claim is a test of the plaintiff's cause of action as stated in the complaint, not a challenge to the plaintiff's factual alle-

gations." *Golden v. City of Columbus*, 404 F.3d 950, 958-59 (6th Cir. 2005). We must therefore construe the complaint in a light most favorable to Lambert and accept all of her factual allegations as true. *See Dubay*, 506 F.3d at 427. Although the factual allegations in a complaint need not be detailed, they "must do more than create speculation or suspicion of a legally cognizable cause of action; they must show *entitlement* to relief." *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (emphasis in original) (citing *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1964-65 (2007)).

2. Municipal liability under 42 U.S.C. § 1983

A prima facie case under § 1983 has two elements: "(1) the defendant must be acting under the color of state law, and (2) the offending conduct must deprive the plaintiff of rights secured by federal law." *Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir. 1998) (citing *Parratt v. Taylor*, 451 U.S. 527, 535 (1981)). To succeed on a § 1983 claim against a local government, the plaintiff must also prove that the injury about which she complains was caused by an unconstitutional government policy or custom. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978) ("[I]t is when execution of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983.").

There is no question, of course, that the Defendants acted under color of state law in making Lambert's traffic citation available on the internet. But the Defendants maintain that they cannot be held liable for Lambert's injuries because they were caused by a third party, the identity thief. Although

they do not frame it as such, this position is in essence an attack on Lambert's ability to show that the violation she alleges was "committed by a person acting under color of state law." *See Harbin-Bey v. Rutter*, 420 F.3d 571, 575, 577 (6th Cir. 2005) (citing *West v. Atkins*, 487 U.S. 42, 48 (1988)) (holding that a prison's classification of an inmate as a security threat due to his gang affiliation did not constitute an equal protection violation). We have determined, however, that a § 1983 plaintiff can "circumvent the state action requirement if he demonstrated that the state created a special danger" in releasing private information that leads to harm. *Barber v. Overton*, 496 F.3d 449, 453-54 (6th Cir. 2007) (explaining that a plaintiff could meet the state-action requirement by demonstrating that the state's disclosure put the plaintiff at risk, but declining to reach that question because the prison guards challenging the release of their personal information by prison officials to prisoners had not demonstrated a constitutional violation of their rights to privacy); *see also Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998) (holding that police officers' privacy interest in their personnel files were of a constitutional dimension where the city "created a very real threat to the officers' and their family members' personal security and bodily integrity, and possibly their lives").

Moreover, Lambert sued the Clerk in his official capacity, which is the equivalent of suing the Clerk's employer, the County. *See Alkire v. Irving*, 330 F.3d 802, 810 (6th Cir. 2003) ("While '[p]ersonal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law,' individuals sued in their official capacities

stand in the shoes of the entity they represent."(alteration in original) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165 (1985))). The only issue in the present case, then, is whether the Clerk's actions, as alleged in Lambert's complaint, were part of a policy or custom that violated Lambert's constitutional right to privacy.

3. The scope of the constitutional right to privacy

Two types of interests have been identified by the Supreme Court as protected by the right to privacy that is rooted in the substantive due process protections of the Fourteenth Amendment. One is the interest in "independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600 & n. 26 (1977) (noting that these decisions have been characterized as dealing with "matters relating to procreation, marriage, contraception, family relationships, and child rearing and education" (quoting *Paul v. Davis*, 424 U.S. 693, 713 (1976))). The other type of privacy interest applicable to individuals is the "interest in avoiding disclosure of personal matters." *Id.* at 599, 603-04 (recognizing that a statute requiring that the state be provided with a copy of certain drug prescriptions implicated the individual's interest in nondisclosure, but upholding the law because the statute contained adequate security measures); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 465 (1977) (assuming that President Nixon had a legitimate expectation of privacy in his private communications, but upholding a federal law that provided for the review and classification of presidential materials by professional archivists). Lambert's claim implicates the latter in-

terest, which this court has described as "an individual's right to control the nature and extent of information released about that individual" and that "has been coined an informational right to privacy." *Bloch v. Ribar*, 156 F.3d 673, 683 (6th Cir. 1998).

This court, in contrast to some of our sister circuits, "has narrowly construed the holdings of *Whalen* and *Nixon* to extend the right to informational privacy only to interests that implicate a fundamental liberty interest." *Id.* at 684. A plaintiff alleging a violation of her right to informational privacy must therefore demonstrate that "the interest at stake relates to 'those personal rights that can be deemed fundamental or implicit in the concept of ordered liberty.' " *Id.* (quoting *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981)). Only after a fundamental right is identified should the court proceed to the next step of the analysis—the balancing of the government's interest in disseminating the information against the individual's interest in keeping the information private. *See Kallstrom*, 136 F.3d at 1061 ("This circuit . . . will only balance an individual's interest in nondisclosure . . . against the public's interest in and need for the invasion of privacy where the individual privacy interest is of constitutional dimension.").

Applying these standards, this court has recognized an informational-privacy interest of constitutional dimension in only two instances: (1) where the release of personal information could lead to bodily harm (*Kallstrom*), and (2) where the information released was of a sexual, personal, and humiliating nature (*Bloch*). In *Kallstrom*, the plaintiffs were undercover police officers who had been actively in-

volved in a drug-conspiracy investigation of a violent gang and who had subsequently testified at trial against a number of the gang's members. 136 F.3d at 1059. During the trial, the city—despite having promised to keep the officers' personnel records confidential—released the officers' records to defense counsel. The records contained, among other personal information, the names and addresses of the officers, their immediate family members, and their personal references. *Id.*

This court in *Kallstrom* concluded that the officers' privacy interests were of constitutional dimension because they implicated a fundamental interest "in preserving their lives and the lives of . . . their family members, as well as preserving their personal security and bodily integrity." *Id.* at 1062. That conclusion was supported by a long line of cases, dating back to the nineteenth century, in which courts have held that individuals have a constitutional right to avoid the kind of physical invasions or abuse that "strip[ ] the very essence of personhood." *Id.* at 1063 (internal quotation marks omitted). The *Kallstrom* court's holding therefore rested on the finding that the city's disclosure had created a risk that the officers' personal information might "fall into the hands of persons likely to seek revenge upon the officers" and had created a "very real threat" to the officers' and their family members' bodily integrity and possibly even their lives. *Id.*

In *Bloch*, this court considered whether the constitutional right to informational privacy was triggered by a press conference in which the sheriff released the "highly personal and extremely humiliating details" of the rape to which Bloch had been sub-

jected, some of which were "so embarrassing she had not even told her husband." *Bloch*, 156 F.3d at 676. The court concluded that Bloch could invoke her Fourteenth Amendment right to privacy because "sexuality and choices about sex, in turn, are interests of an intimate nature which define significant portions of our personhood." *Id.* at 685.

As in *Kallstrom*, this court's holding in *Bloch* was premised on the notion that the disclosure of private sexual information implicated a "fundamental right or one implicit in the concept of ordered liberty"—namely the fundamental right of privacy in one's sexual life. *Id.* at 684, 686. The clear principle emerging from *Bloch* is that the sheriff's publication of the details of Bloch's rape implicated her right to be free from governmental intrusion into matters touching on sexuality and family life, and that to permit such an intrusion would be to strip away the very essence of her personhood. *See id.* at 685 (citing *Thorne v. City of El Segundo*, 726 F.2d 459, 468 (9th Cir. 1983), for the proposition that an individual's privacy right in her sexual activities "follow[ed] from the cases holding that such basis matters as contraception, abortion, marriage, and family life are protected by the constitution from unwarranted government intrusion").

4. Lambert's claim of a constitutional deprivation

In the face of the Sixth Circuit's restrictive view of informational privacy, Lambert makes two principal arguments to support her assertion that the district court erred in dismissing her complaint. She first claims that the district court's analysis was

flawed because "[t]he proper framework should be whether the claimant has a 'reasonable expectation of privacy' in the information he or she wants to keep private, and, if so, whether the government has any legitimate interest in disclosing such information to weigh against the individual interest in disclosure." Second, she contends that the court erred in concluding that the Clerk's publication of her traffic citation on the internet did not implicate a fundamental right.

a. Request for a new standard

Lambert's first argument is a request for us to adopt a new approach to assessing informational privacy claims—one that does not require the court to first determine whether the privacy interest implicates a fundamental right. The reasonable-expectation-of-privacy standard that Lambert proposes is in many ways similar to the more fluid approach that other circuits have adopted for assessing claims of informational privacy. *See Kallstrom*, 136 F.3d at 1061 n.1 (citing cases in support of the proposition that "[o]ther circuits have interpreted *Whalen* and *Nixon* as creating a broad constitutional right to informational privacy to be balanced against the public's interest and need for the invasion of privacy"); *cf.* Helen L. Gilbert, Comment, *Minors' Constitutional Right to Informational Privacy*, 74 U. Chi. L. Rev. 1375, 1382 (2007) (contrasting the Sixth Circuit's approach to informational privacy with other circuits that do not require the implication of a fundamental liberty interest, and instead "decide if the party alleging an invasion of privacy has a legitimate expectation of privacy in the information in question").

Employing this standard, Lambert argues that she has a reasonable expectation of privacy in her Social Security number, and that the district court therefore erred in failing to balance that interest against the Defendants' interest in publishing unredacted public records on the internet. Lambert is of course correct in pointing out that both Congress and the courts have recognized the privacy interest in one's Social Security number. *See, e.g.*, Privacy Act of 1974, 5 U.S.C. § 552a (providing restrictions on the disclosure of Social Security numbers); *Sherman v. U.S. Dep't of the Army*, 244 F.3d 357, 365 (5th Cir. 2001) (noting, in the context of a Freedom of Information Act request, that "an individual's informational privacy interest in his or her SSN [Social Security number] is substantial"); *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999) (recognizing that "the indiscriminate public disclosure" of Social Security numbers might implicate the constitutional right to privacy, but concluding that any interest in nondisclosure was outweighed by the government's interest in making bankruptcy documents available to the general public).

The Sixth Circuit, however, has developed and applied a different approach to assessing informational privacy claims. As discussed above, that approach requires that the asserted privacy interest implicate a fundamental right. *See Bloch*, 156 F.3d at 684; *DeSanti*, 653 F.2d at 1090 (holding that the disclosure of juveniles' records to juvenile court personnel did not implicate the plaintiffs' fundamental rights); *Kallstrom*, 136 F.3d at 1061-62 (explaining that the *DeSanti* court "rejected the notion of a general constitutional right of nondisclosure of personal

information against which the governmental action must be weighed"). We are bound by those decisions unless this court sitting en banc or the Supreme Court holds otherwise, and Lambert's argument must fail for that reason. *See Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) (explaining that the decision of a prior panel "remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision").

b. Existence of a fundamental right

The district court recognized that this court's precedents require a showing of a privacy interest that implicates a right that is either "fundamental" or "implicit in the concept of ordered liberty." *See Bloch*, 156 F.3d at 684. After reviewing *Kallstrom* and *Bloch*, it concluded that Lambert could not meet this standard because she had "only identified a risk of financial harm." This harm, the court noted, "bears no equivalence to the potential and actual harm suffered by the *Kallstrom* and *Bloch* plaintiffs, respectively." The court therefore refused to balance Lambert's privacy interest against the Defendants' interest in making public records available on the internet. Lambert disputes the district court's conclusion that her harm does not meet the first prong of the test for informational-privacy claims, arguing that the Defendants' invasion of her privacy implicates her fundamental rights.

There are two ways for Lambert to demonstrate that a fundamental right underlies her privacy claim. The first would be to link her interest in non-

disclosure to an already established fundamental right. Indeed, this is how the plaintiffs in *Kallstrom* and *Bloch* succeeded. *See Bloch*, 156 F.3d at 685 (acknowledging the well-recognized right to privacy in intimate matters); *Kallstrom*, 136 F.3d at 1062-63 (describing the long history of the right to bodily integrity). Lambert attempts to make this showing by claiming that, like the police officers in *Kallstrom*, her fundamental liberty interest in personal security was compromised by the Clerk's actions.

Alternatively, Lambert could attempt to identify a new fundamental right that was implicated by the public disclosure of her Social Security number. Because the very notion of a fundamental right is rooted in substantive due process, such rights must be based on a protectible interest in life, liberty, or property. *See Does v. Munoz*, 507 F.3d 961, 965 (6th Cir.2007) (explaining that some deprivations of life, liberty or property are subject to substantive limitations that provide "heightened protection against government interference with certain fundamental rights" (citations and internal quotation marks omitted)). But this court has recognized that "identifying a new fundamental right subject to the protections of substantive due process is often an uphill battle, as the list of fundamental rights is short." *Id.* (internal quotation marks omitted). Any fundamental right, moreover, must be either "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." *Id.* (internal quotation marks omitted).

Lambert asserts that the privacy invasion she has alleged is related to (1) her right to personal security, (2) her right to her reputation and good

name, and (3) her right to property. She describes the first two as fundamental liberty interests, and the third as a fundamental property interest.

i. Liberty interests

Lambert asserts that the disclosure of her Social Security number implicates two liberty interests. First, she characterizes the theft of her identity as an interference with the right to personal security recognized in *Kallstrom*. She then describes the damage to her credit rating as an injury to her reputation, which she claims this court has recognized as a fundamental liberty interest.

Lambert's attempt to characterize the Clerk's action as an interference with her right to personal security as discussed in *Kallstrom* is unpersuasive. The *Kallstrom* court unambiguously identified the right involved in that case as one of personal security and bodily integrity, making clear that the fundamental right at issue was a protection against physical invasions. Indeed, the court in *Kallstrom* noted that not even all risks of physical harm created by disclosure would trigger the right to privacy under the Fourteenth Amendment. Rather, the officers in that case could invoke constitutional protection only because they were placed "at substantial risk of serious bodily harm, possibly even death, from a perceived likely threat." *Kallstrom*, 136 F.3d at 1064.

Lambert does not argue that the Clerk's actions put her at any risk of physical harm. And although she is undoubtedly correct that identity theft constitutes a serious personal invasion, it simply does not implicate the well-established right to personal secu-

rity as contemplated by this court in Kallstrom. *Cf. Barber v. Overton*, 496 F.3d 449, 456 (6th Cir. 2007) (declining to recognize a privacy interest of a constitutional dimension where prison officials inadvertently released the Social Security numbers of prison guards to inmates, and concluding that "the release of the social security numbers was not sensitive enough nor the threat of retaliation apparent enough to warrant constitutional protection here").

Lambert next claims that the harm to her "creditworthiness" constitutes a reputational injury that implicates a fundamental liberty interest. Despite the obvious reputational interests at play in *Bloch*, Lambert makes no attempt to analogize her harm to that of the injury suffered by the rape victim in that case. She instead relies on this court's decision in *Chilingirian v. Boris*, 882 F.2d 200 (6th Cir.1989), for the proposition that "a person's reputation, good name, honor, and integrity are among the liberty interests" protected by the Fourteenth Amendment. *Id.* at 205 (citing *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972)).

Even accepting the questionable assertion that one's credit rating is the type of reputational interest protected by the Due Process Clause of the Fourteenth Amendment, the fact that this court has recognized a liberty interest in one's reputation does not necessarily mean that such an interest is either "fundamental" or "inherent in the concept of ordered liberty." *Cf. Does*, 507 F.3d at 965 (explaining that substantive due process protects only "certain fundamental rights and liberty interests," and noting that the "list of fundamental rights is short" (internal quotation marks omitted)). Moreover, the plain-

tiff in *Chilingirian* brought a procedural due process claim, and this court concluded that an informal "name-clearing hearing" provided sufficient protection of the plaintiff's liberty interest in his reputation. *Chilingirian*, 882 F.2d at 205-06. But the very fact that an informal hearing was sufficient to protect Chilingirian's liberty interest in his reputation negates Lambert's claim that the interest involved was fundamental. *See Does*, 507 F.3d at 964 (noting that certain deprivations of liberty fundamental enough to violate a person's right to substantive due process "are subject to limitations regardless of the adequacy of the procedures employed" (emphasis added) (internal quotation marks omitted)).

Lambert has provided no support for the proposition that the harm to her credit implicates a liberty interest that any court has recognized as fundamental, and her argument to the contrary is simply unpersuasive. Furthermore, she does not even begin to meet the hurdle required for the recognition of a new fundamental right. The protection of a person's credit is a concept relating to one's finances and economic well-being, one that by its very nature bears no relationship to the kinds of interests that are "implicit in the concept of ordered liberty." *See Overstreet v. Lexington-Fayette Urban County Gov't*, 305 F.3d 566, 575 (6th Cir. 2002) (affirming the denial of a preliminary injunction to a county employee who challenged a policy mandating public disclosure of real estate holdings because "[t]he privacy interest one may have in one's personal finances and real estate holdings is far afield from [the] intimate concerns" recognized as fundamental privacy interests); *cf. Cutshall v. Sundquist*, 193 F.3d 466, 481 (6th Cir.

1999) (rejecting a challenge to a state sex-offender registry on constitutional privacy grounds because the law did "not impose any restrictions on [the plaintiff's] personal rights that are fundamental or implicit in the concept of ordered liberty, such as his procreative or marital rights"). We therefore agree with the district court that Lambert's injuries are more properly described as financial in nature and not truly liberty interests at all.

ii. Property interest

Although this court has never acknowledged a constitutional right to privacy based on the infringement of a property interest, Lambert urges us to recognize such a right in this case. She contends that the Clerk's disclosure of her Social Security number implicated her "fundamental right to property," and that we should proceed to balance her privacy interest against the government's purpose in publishing records on the internet. The Defendants, in contrast, contend that *Kallstrom* and *Bloch* make clear that this court will recognize a privacy interest of constitutional magnitude only if a fundamental liberty interest is implicated.

Even if we were prepared to recognize a constitutional privacy interest based on a property right, Lambert's claim would fail because she has not demonstrated that she had a constitutionally protectible property interest in her personal information. *See Silver v. Franklin Twp. Bd. Of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992) ("To establish a violation of substantive due process, a plaintiff must first establish the existence of a constitutionally-protected property . . . interest."). Lambert never ar-

ticulates precisely what property deprivation the Defendants' exacted upon her, although we presume that she is referring to the various financial injuries she suffered. The Defendants, however, are correct to point out that this court's precedents are not amenable to the recognition of a constitutional right to privacy based on the infringement of a property interest. *See, e.g.*, *Overstreet*, 305 F.3d at 575 (declining to recognize a privacy interest of constitutional dimension "in one's personal finances and real estate holdings"); *Bloch*, 156 F.3d at 684 (noting that this court has "extend[ed] the right to informational privacy only to interests that implicate a fundamental liberty interest" (emphasis added)).

Lambert has undoubtedly shown that, as a policy matter, the Clerk's decision to provide unfettered internet access to people's Social Security numbers was unwise. This much is evidenced by the fact that the Defendants have subsequently removed the citations in question from the website and changed the local rules to better protect sensitive personal information. But to constitutionalize a harm of the type Lambert has suffered would be to open a Pandora's box of claims under 42 U.S.C. § 1983, a step that we are unwilling to take. *See Paul v. Davis*, 424 U.S. 693, 699 (1976) (rejecting a § 1983 claim against police officials who included the plaintiff's name and mug shot on a flyer warning local merchants about possible shoplifters, and explaining that the plaintiff's legal argument "would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment"). Indeed, absent a showing of an

infringement of a right that is "fundamental or implicit in the concept of ordered liberty," this court's precedents bar an action under 42 U.S.C. § 1983 from proceeding any further. Lambert has simply failed to make such a showing.

III. CONCLUSION

For all of the reasons set forth above, we AFFIRM the judgment of the district court.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO

CYNTHIA LAMBERT, *Plaintiff*, v. GREG HARTMANN, in his official capacity as Clerk of Courts, and HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS, *Defendants*.	Dec. 29, 2006 No. 1:04CV837. **ORDER**

Anita P. Berding, Christian A. Jenkins, Marc David Mezibov, Mezibov & Jenkins LLP, Cincinnati, OH, for Plaintiff.

Michael Gerard Florez, Assistant Prosecutor, Hamilton County Ohio, Pamela J. Sears, Hamilton County Prosecutor, Cincinnati, OH, for Defendants.

WATSON, J.

This matter is before the Court upon Defendants Greg Hartmann and Hamilton County Board of County Commissioners' Motion to Dismiss. (Doc. 35) Plaintiff has filed a Memorandum in Opposition (Doc. 43) and a Notice of Supplemental Authority (Doc. 53). Defendant filed a Reply (Doc. 49), and the Court permitted Plaintiff to file a Surreply (Doc. 49).

Also pending before the Court are Plaintiff's Motion for Leave to File Amended Complaint, Defendants' Memorandum in Opposition (Doc. 37), Plaintiff's Reply (Doc. 43), Defendants' Reply (Doc. 47), Plaintiff's Motion for Leave to Amend Complaint (Doc. 64), and Defendants' Reply (Doc. 65).

A. FACTS

The following factual background is based upon the allegations in Plaintiff's Complaint, Plaintiff alleges that in September of 2003 she was issued a speeding ticket. (Doc. 1, ¶ 7) The officer issuing the ticket used the Ohio Uniform Traffic Ticket, which included Plaintiff's name, signature, home address, birth date, driver's license number, and social security number.(Id.¶¶ 7-8) The ticket was filed with the Hamilton County Clerk's Office. (Id.¶ 9) The ticket was then published on the Clerk's website. (Id.¶ 10)

Approximately a year after Plaintiff received the speeding ticket, Plaintiff received a call from a Sam's Club store regarding a large purchase made by an individual purporting to be Plaintiff. (Id.¶ 11) Using a driver's license with Plaintiff's personal identifying information, the individual was able to purchase over $8,000.00 in electronics. (Id.) The next day, Plaintiff received a call from a Home Depot store regarding a credit card account opened in her name. (Id.¶ 12) An individual using a driver's license with Plaintiff's personal information charged approximately $12,000.00 in purchases to this account. (Id.) Plaintiff learned that the driver's license number used on the identification produced by the individual purporting to be her was wrong by one digit. (Id.¶ 13) Plaintiff found the speeding ticket on the Clerk's

website and noted that the officer had recorded her driver's license number off by one digit. (Id.) Subsequently, Plaintiff learned that the Blue Ash Police had arrested a woman who the Police believed had stolen Plaintiff's identity. (Id. at ¶ 16)

Plaintiff alleges that as a direct and proximate result of the publication of her social security number and other personal identifying information on the Clerk's website, Plaintiff has suffered economic damages, damages to her personal credit rating, and damage to her reputation. (Id. at ¶ 19)

Plaintiff brings this action on behalf of herself and others similarly situated. (Id.¶ 1) Plaintiff brings claims for violation of her right to privacy under the United States Constitution; violation of her Fourteenth Amendment right to personal security; violation of her right to procedural and substantive due process under the Fourteenth Amendment; violation of her legitimate expectation of privacy to be free from unreasonable search and seizure under the Fourth Amendment; violation of her right to privacy under Ohio common law; and publication of private facts under Ohio common law. (Id.¶¶ 30-41) In her first Motion for Leave to File Amended Complaint, Plaintiff seeks to amend her Complaint by properly naming the Hamilton County Commissioners; cite to more specific relief in the form of a court-supervised credit monitoring fund or other prophylactic relief; delete unnecessary facts; and add two additional allegations.[1] (Doc. 29) Plaintiff's Second Motion for

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[1] These allegations are that Defendants have known since 2002 that individuals have been using information gathered from

(Footnote continued)

Leave to Amend Complaint seeks to add two claims. (Doc. 64) The first claim is one for interference with rights common to the public, including the right to privacy, the right to be free from unlawful identity theft, the right to personal security and integrity, and the rights secured by Ohio Revised Code Chapter 1347. The second claim is one for a violation of Ohio's Privacy Act, Ohio Rev.Code § 1347.01, *et seq.*

B. ANALYSIS

1. *Motion to Dismiss Standard*

Defendants' motion is made pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6).

The Sixth Circuit has distinguished between facial and factual attacks among motions to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). *Pritchard v. Dent Wizard Intern. Corp.*, 210 F.R.D. 591, 592 (S.D.Ohio 2002). A facial attack on the subject matter jurisdiction alleged by the complaint merely questions the sufficiency of the pleading. *Ohio Nat. Life Ins. Co. v. U.S.*, 922 F.2d 320, 325 (6th Cir. 1990). In reviewing such a facial attack, a trial court takes the allegations in the complaint as true, which is a similar safeguard employed under 12(b)(6) motions to dismiss. *Id.* Here, Defendants' Motion attacks the sufficiency of the pleadings, and is therefore a facial attack.

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traffic tickets posted on the Clerk's website in order to commit identity theft; and personal information can be shared or sold to others who may hold it for years before using it to commit crimes.

A motion to dismiss under Rule 12(b)(6) requires this Court to construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief. *Meador v. Cabinet for Human Resources,* 902 F.2d 474, 475 (6th Cir. 1990), *cert. denied,* (1990)."However, while liberal, this standard of review does require more than the bare assertion of legal conclusions." *Columbia Natural Res., Inc. v. Tatum,* 58 F.3d 1101, 1109 (6th Cir. 1995); *see also Chapman v. City of Detroit,* 808 F.2d 459, 465 (6th Cir. 1986) ("It is not enough for a complaint . . . to contain mere conclusory allegations of unconstitutional conduct by persons acting under color of state law. Some factual basis for such claims must be set forth in the pleadings.").

2. *Constitutional Right to Privacy*

Defendants argue that Plaintiff has failed to state a claim under 42 U.S.C. § 1983 because she has no constitutional right to privacy in her social security number.

Section 1983 imposes civil liability on a person acting under color of state law who deprives another of the "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Therefore, a plaintiff must allege two elements to establish a *prima facie* case under section 1983:(1) that the action occurred "under color of law"; and (2) that the action was a deprivation of a constitutional right or a federal statutory right. *Parratt v. Taylor,* 451 U.S.

527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986).

Plaintiff principally relies upon two cases for the proposition that an individual has a constitutional right to privacy in one's social security number: *Smith v. City of Dayton*, 68 F.Supp.2d 911 (S.D.Ohio 1999) and *State ex. rel. Beacon Journal Publishing Co. v. City of Akron*, 640 N.E.2d 164 (Ohio 1994).

In *Smith*, at issue was the release of information from a police officer's personnel file, including his home address and the results of his psychological and mental examinations. 68 F.Supp.2d at 915. This Court recognized that the Ohio Supreme Court in *Beacon Journal* had recognized a federal constitutional right to privacy in one's Social Security number. *Id.* at 917. However, this Court called this holding into doubt based on the Sixth Circuit's decision in *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir.1998). Ultimately, this Court found that under *Kallstrom*, the plaintiff did have a right to privacy in his address. However, the Court finds that the finding of a constitutional right to privacy is not automatic, and cannot be applied to broad categories of information.[2] Instead, this Court must analyze the

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[2] A review of other decisions by the district courts within the Sixth Circuit reveals that district courts have declined to find a constitutional right to privacy in personal information. *Lawson v. Baxter*, 2006 WL 3004069, *2, n. 1 (W.D. Mich. October 20, 2006) (slip op.) (expressing doubt that any privacy right under the Fourteenth Amendment extends to release of plaintiffs social security number or other private information); *Pitts v. Perkins Local School Board*, 2006 WL 1050675, *2 (N.D. Ohio

(Footnote continued)

asserted right under the Supreme Court's decisions in *Whalen v. Roe*, 429 U.S. 589 (1977) and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), and the Sixth Circuit's interpretation of these cases, including *Kallstrom*.

In *Whalen*, the Supreme Court considered whether a New York statute violated a patient's constitutional right to privacy. 429 U.S. at 591. The statute required that the names and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and an unlawful market. *Id.* The Court recognized two different kinds of privacy interests: (1) the "interest in independence in making certain kinds of important decisions," and (2) the interest "in avoiding disclosure of personal matters." *Id.* at 599-600. The Court found there was no constitutional violation because the New York law evidenced a proper concern for the protection of the individual's interest in privacy. *Id.* at 605-606.[3]

April 19, 2006) (unpublished) (no Fourth Amendment right to privacy in address, phone number, and social security number).

[3] The Court recognized the potential threat to privacy in the collection of vast amounts of data, but because the statute, and its implementing administrative procedures "evidence[d] a proper concern with, and protection of, the individual's interest in privacy," the Court stated that it "need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data-whether intentional or unintentional-or by a system that did not contain comparable security systems." *Id.* at 605-606. Justice Stewart wrote separately and noted the Court's opinion did not support the proposition that broad dissemination of the information

(Footnote continued)

In *Nixon*, the former president brought a constitutional challenge to the Presidential Recordings and Materials Preservation Act, which directed the Administrator of General Services to take custody of presidential tapes and other materials that accumulated during Nixon's presidency, separate the private from the public, and retain the public. 433 U.S. at 425. Nixon argued that the statute violated his right of privacy under the Fourth and Fifth Amendments. *Id.* at 455. The Court found that Nixon did have a legitimate expectation of privacy in private communications between himself and his family, his physician, or his minister. *Id.* at 457 (recognizing that "public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity."). However, the Court held that the statute did not violate Nixon's right of privacy. *Id.* at 465. The Court explained that Nixon's expectation of privacy was outweighed by the limited intrusion of the screening process, by Nixon's status as a public figure, by his lack of any expectation of privacy in the overwhelming majority of the materials, by the important public interest in the preservation of the materials, and by the virtual impossibility of segregating the small quantity of private materials without comprehensive screening. *Id.*

The Sixth Circuit has narrowly construed *Whalen* and *Nixon*, holding that the right to privacy is trig-

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collected by the state would violate the Constitution. *See id.* at 608-609.

gered only when the interest at stake concerns "those personal rights that can be deemed 'fundamental' or 'implicit' in the concept of ordered liberty." *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981) ("Absent a clear indication from the Supreme Court we will not construe isolated statements in *Whalen* and *Nixon* more broadly than their context allows to recognize a general constitutional right to have disclosure of private information measured against the need for disclosure."); *see also Kallstrom v. City of Columbus*, 136 F.3d 1055, 1061 (6th Cir. 1998) ("This circuit has read *Whalen* and *Nixon* narrowly, and will only balance an individual's interest in nondisclosure of informational privacy against the public's interest in and need for the invasion of privacy where the individual privacy interest is of constitutional dimension.") Therefore, the Sixth Circuit has concluded that the Constitution does not encompass a "general right to nondisclosure of private information." *DeSanti*, 653 F.2d at 1090.[4]

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[4] In *J.P. v. DeSanti*, juveniles who had been convicted of a crime challenged the release of personal information to governmental, social, and religious agencies. *Id.* at 1082.The Sixth Circuit rejected their claim, observing that "the fact that the Constitution protects several specific aspects of individual privacy does not mean that it protects all aspects of individual privacy. Nor is there any indication in any [Supreme Court privacy decisions] of a constitutional right to nondisclosure of juvenile court records." *Id.* at 1088. However, the court explained that their opinion should not be read as holding that there is no constitutional right to nondisclosure of private information. *Id.* at 1090. Instead, the court explained that "[o]ur opinion simply holds that not all rights of privacy or interests in nondisclosure of private information are of constitutional dimension, so as to require balancing government action against individual pri-

(Footnote continued)

Therefore, not all disclosures of private information will trigger constitutional protection. The Sixth Circuit requires the following two-step process for analyzing informational right-to-privacy claims: (1) the interest at stake must implicate either a fundamental right or one implicit in the concept of ordered liberty; and (2) the government's interest in disseminating the information must be balanced against the individual's interest in keeping the information private. *Bloch v. Ribar*, 156 F.3d 673, 684 (6th Cir. 1998), *citing DeSanti*, 653 F.2d at 1090-91.

In *Kallstrom v. City of Columbus*, the Sixth Circuit found that under the first step of the above analysis, the plaintiffs had a privacy interest in personal information of a constitutional dimension. 136 F.3d at 1062. The facts of *Kallstrom* are that the City of Columbus disclosed personal information contained in police officer personnel files to defense counsel during a criminal trial in which the officers testified against the defendants. *Id.* at 1058. The court noted that "[i]ndividuals have 'a clearly established right under the substantive component of the Due Process Clause to personal security and to bodily integrity,' and this right is fundamental where 'the magnitude of the liberty deprivation that [the] abuse inflicts upon the victim . . . strips the very essence of personhood.'" 136 F.3d at 1062-63, *quoting Doe v. Claiborne County*, 103 F.3d 495, 507 (6th Cir.

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vacy." *Id.* at 1091. Since *DeSanti*, the Sixth Circuit has found that the dissemination of private information may implicate a constitutional right to privacy. *See, e.g., Bloch v. Ribar*, 156 F.3d 673, 686 (6th Cir. 1998); *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062 (6th Cir. 1998), *discussed infra*.

1996). The Court explained that "it goes without saying that an individual's 'interest in preserving her life is one of constitutional dimension.'" *Id., quoting Nishiyama v. Dickson County,* 814 F.2d 277, 280 (6th Cir. 1987) (en banc). The court concluded that the disclosure of the officers' addresses, phone numbers, and driver's licenses, as well as the personal information of their family members rose to a constitutional dimension because of the threat to the personal security and bodily integrity of the officers and their family members. *Id.* at 1063. The court therefore proceeded to the second step, and balanced the officers' interests against those of the city. *Id.* The court noted that Ohio's Public Records Act required the state to make available all public records to any person, and for purposes of the case before it, assumed that the interest in public access to these records rose to a compelling state interest. *Id.* at 1064-65. Nevertheless, the court found that the release of the officers' information was not narrowly tailored to serve these interests. *Id.* at 1065. The court explained: "[w]hile there may be situations in which the release of the this type of personal information might further the public's understanding of the workings of its law enforcement agencies, the facts as presented here do not support such a conclusion." *Id.*

In *Bloch v. Ribar,* the Sixth Circuit again found that the plaintiffs had an interest at stake which implicated either a fundamental right or one implicit in the concept of ordered liberty. 156 F.3d at 685. In *Bloch,* a rape victim and her husband claimed that the sheriff violated their constitutional rights by holding a press conference to release the confidential

and highly personal details of the rape by an unknown assailant. *Id.* at 676. The court noted that "[t]he fact that the crime of rape occurred in this case implicates both a private and a public interest, but the details of the rape primarily implicate a private interest until such time as the public interest in prosecution predominates." *Id.* at 685-86. Therefore, the court concluded that "a rape victim has a fundamental right of privacy in preventing government officials from gratuitously and unnecessarily releasing the intimate details of the rape where no penalogical purpose is being served." *Id.* at 686. Moving to the second step of the analysis, the court explained that it appeared that there was no justification for disseminating the details of the rape at the time of the press conference. *Id.* Therefore, the court found that the plaintiffs had raised a cognizable privacy claim under section 1983. *Id.*

Unlike *Kallstrom* and *Bloch,* the Court determines that Plaintiff's alleged privacy interest in her name, signature, home address, birth date, driver's license number, and social security number do not implicate either a fundamental right or one implicit in the concept of ordered liberty. Plaintiff has only identified a risk of financial harm. While the Court is not unmindful of the problems which may result from the release of personal information, it nonetheless is beyond dispute that plaintiff's injury from the release of information in this case bears no equivalence to the potential and actual harm suffered by the *Kallstrom* and *Bloch* plaintiffs, respectively, which harm the Sixth Circuit has found to be protected by the Fourteenth Amendment. Therefore, the Court concludes that based upon the allegations in

the Complaint, Plaintiff is not entitled to relief under section 1983. The Court finds that nothing within Plaintiff's proposed amendments to the Complaint would alter this conclusion.

4. *State Law Claims*

Having found that Plaintiff's constitutional claims are to be dismissed, the Court now turns to Plaintiff's claims under Ohio law for violation of her right to privacy and publication of private facts, as well as Plaintiff's proposed claims for interference with rights common to the public, including the right to privacy, the right to be free from unlawful identity theft, the right to personal security and integrity, and the rights secured by Ohio Revised Code Chapter 1347; and violation of Ohio's Privacy Act, Ohio Rev. Code § 1347.01, *et seq.*

The Court has supplemental jurisdiction over these state law claims because these claims form part of the same controversy as Plaintiff's Section 1983 claim. *See* 28 U.S.C. § 1367(a). However, this Court may decline to exercise supplemental jurisdiction if:

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). When a plaintiff's federal claims have been dismissed on the merits, the question of whether to retain jurisdiction over the state law claims rests within the Court's discretion. *Blakely v. United States,* 276 F.3d 853, 860 (6th Cir. 2002). However, the dismissal of the claim over which the federal court had original jurisdiction creates a presumption in favor of dismissing without prejudice any state-law claims that accompanied it to federal court. *Id.* at 863. In addition, "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 726 (1966). The Court finds that the issues presented are more appropriate for resolution by the state court system, and therefore the Court declines to exercise its supplemental jurisdiction.

C. CONCLUSION

Defendants Greg Hartmann and Hamilton County Board of County Commissioners' Motion to Dismiss (Doc. 35) is hereby **GRANTED**. It is further **ORDERED** that Plaintiff's constitutional claims under section 1983 are **DISMISSED WITH PREJUDICE**; and the remaining claims based on state law are **DISMISSED WITHOUT PREJUDICE**.

IT IS SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CYNTHIA LAMBERT, *Plaintiff-Appellant,* v. GREG HARTMAN, in his official capacity as Clerk of Courts, and HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS, *Defendants-Appellees.*	July 14, 2008 No. 07-3154 **ORDER**

GUY, GILMAN, and McKEAGUE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge or this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

Leonard Green, Clerk

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No. 08-500

Supreme Court, U.S.
FILED
NOV 17 2008
OFFICE OF THE CLERK

In The
Supreme Court of the United States

CYNTHIA LAMBERT,

Petitioner,

v.

GREG HARTMANN, IN HIS OFFICIAL CAPACITY AS CLERK OF COURTS FOR HAMILTON COUNTY, OHIO, AND HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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November 17, 2008

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QUESTIONS PRESENTED

1. Does a case and controversy continue to exist in a case after third parties reimbursed the plaintiff for her losses and subsequent statutory changes have been enacted to prevent the alleged damage from again occurring?

2. When a person's name, social security number, address, driver's license number, physical description, birth date and signature are in the public domain because they are part of a Complaint and summons in a criminal case, does the right to privacy in the Fourteenth Amendment to the United States Constitution control the medium by which they are made available to the public?

3. Does the Fourteenth Amendment to the Constitution of the United States create a right to privacy in a person's name, social security number, address, driver's license number, physical description, birth date and signature?

4. Where the required contents of a Complaint and Summons include personal identifiers and where state law gives a county clerk of courts the non-discretionary duty to accept the Complaint and Summons for filing, is the county clerk of courts performing a state function and immune from suit under the Eleventh Amendment?

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OPINIONS BELOW

The district court issued an order granting a motion to dismiss based upon the initial Complaint filed by Petitioners. Since the District Court did not convert the motion to dismiss into a motion for summary judgment, it did not consider the various depositions in its resolution of the case. The Petitioners also filed a motion to amend the Complaint to alter the relief requested. The District Court did not grant the motion to amend the Complaint. The Order of the District Court granting the motion to dismiss is unreported and attached as Appendix M.

The Sixth Circuit did consider the proposed amended complaint in affirming the decision of the District Court to dismiss the Petitioner's case. The decision of the Sixth Circuit is reported as *Cynthia Lambert v. Greg Hartmann and the Hamilton County Board of Commissioners* 517 F. 3d 433 (6th Cir. 2008). It is attached hereto as Appendix K. Motions for a rehearing and an *en banc* hearing were denied. The order denying rehearing and an *en banc* hearing are attached as Appendix L.

JURISDICTION

The United States Supreme Court has jurisdiction to hear appeals from the circuit courts of appeal under authority of 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES & REGULATIONS

The following relevant provisions are inlcuded in the appendix: Eleventh Amendment to the United

States Constitution, Appendix A; Fourteenth Amendment to the United States Constitution, Appendix B; R.C. 1901.20, Appendix E; R.C. 1901.31(E), Appendix F; R.C. 149.43, Appendix D; R.C. 4507.13(A), Appendix G; 5 U.S.C. § 552, Appendix C; Ohio Traffic Rule 1(B), Appendix H; Ohio Traffic Rule 3, Appendix I.

STATEMENT OF THE CASE

Since 1975, Ohio has had a uniform system for traffic tickets set out in the Ohio Traffic Rules. A traffic ticket is required to be on the forms set out in the Appendix to the Ohio Traffic Rules. See Ohio Traffic Rule 3. The traffic ticket constitutes a summons and complaint which must be used in all moving violation cases in Ohio. All Ohio Courts having jurisdiction over traffic cases must accept the Ohio Uniform Traffic Ticket for filing. Significantly, the Ohio Uniform Traffic ticket contains a place for the issuing officer to insert the offender's name, social security number, address, driver's license number, physical description, and birth date as well as a place for the traffic offender to sign acknowledging receipt of the summons contained in the traffic ticket. Each ticket is to be issued as an original and three copies. The original goes to the court in which the case will be heard. One copy is given to the offender. Another is retained by the police department issuing the ticket. The third, and final copy, is sent to the Ohio Bureau of Motor Vehicles. See Ohio Traffic Rule 3.

Ohio Municipal Courts have jurisdiction over traffic cases. See *R.C. 1901.20.* Respondent Hartmann is the Clerk of the Hamilton County Municipal Court who is required, among other things, to ". . . file and safely

keep all journals, records, books and papers belonging or appertaining to the court; record the proceedings of the court" and " . . . prepare and maintain a general index, docket, and other records of the court that the court, by rule , requires, all of which shall be the public records of the court." See *R.C. 1901.31(E).* Ohio also has a public records law, *R.C. 149.43*, which makes all records held by Ohio governmental units public unless a particular exemption applies[1]. At the time of the actions alleged in Petitioner's Complaint, filed with the District Court, no exemption from the public records law for social security numbers or personal identifying information existed. Additionally, *R.C. 149.43*, requires custodians of public records to make the records available to the public in the medium in which they were stored. *R.C. 149.43(B)(6).* Custodians of the records must make original documents available for public view. See *R.C. 149.43(B)(1).* While penalties exist for non-disclosure of Ohio public records, no penalties exist for disclosure of exempt documents. See *State ex rel. Akron Beacon Journal v. Maurer*, 91 Ohio St. 3d 54 (2001). In 1999, Respondent Hartmann's predecessor made the public records held by the Hamilton County Clerk of Courts available to the public on the Internet. Complaint ¶5.

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[1] *R.C. 149.43* has been amended numerous times since the actions alleged in the Complaint. The Ohio Supreme Court has interpreted R.C. 149.43 to allow the custodian of the records to redact certain information and to provide additional monetary penalties for non-disclosure by a records custodian. See *State ex rel Highlander v. Ruddick*, 103 Ohio St. 3d 370, 816 N.E.2d 213 (2004); *State ex rel. Montgomery Cty. Pub. Defender v. Siroki*, 108 Ohio St. 3d 207, 842 N.E.2d 508 (2006). The citations to *R.C. 149.43* in the text are to the version that existed in September, 2003.

Against this backdrop, on September 23, 2003, a traffic ticket was issued to Petitioner Lambert. Complaint ¶7. The traffic ticket was issued to Petitioner Lambert and processed in accordance with the Ohio Traffic Rules. Complaint ¶8, ¶9. Approximately one year after receiving the traffic ticket, Petitioner Lambert alleges that her personal information was used to fabricate a fake driver's license which was presented at a Sam's Club and a Home Depot to make purchases on credit. Complaint ¶11. The Complaint does not allege that Petitioner Lambert's social security number appeared on the fake driver's license.[2] Ohio law does not require that a social security number be on the driver's licence. *R.C. 4507.13(A).*

While copies of the traffic ticket were available in paper form at the Ohio Bureau of Motor Vehicles, the issuing police department, the Hamilton County Clerks office, in addition to the paper copy in Petitioner Lambert possession, she speculates that the person posing as Petitioner Lambert in creating the fake driver's license "might" have obtained a copy of the traffic citation from the official website of Petitioner Hartmann or his predecessor. Complaint ¶13.

Subsequently, a Ms. Sutherland was arrested for stealing Petitioner Lambert's identity. Ms. Sutherland, at the time the Complaint was filed, was

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[2] The Complaint alleges that the fake driver's license contained a fake driver's license number. In extending credit to the criminal in Petitioner Lambert's name, Home Depot and Sam's Club apparently relied upon fake personal identifiers on a fake driver's license. Complaint ¶ 13.

awaiting trial. Complaint ¶16. The Complaint sought money damages and injunctive relief to prevent the Petitioner Hartmann from publishing the personal identification information on his website.

A Complaint was filed in the United States District Court, Southern District of Ohio on December 20, 2004. (Doc. 1). A motion to dismiss the Complaint was filed on September 2, 2005. (Doc. 35). The motion to dismiss was granted on December 29, 2006. (Doc. 69). The District Court held that Petitioner Lambert had no right of privacy in her name, social security number, address, driver's license number, physical description, birth date and signature all of which were on the traffic ticket. The District Court relied upon *J.P. v. DeSanti*, 653 F.2d 1080 (6th Cir. 1981). The Sixth Circuit affirmed on February 5, 2008. An *en banc* hearing was denied on July 14, 2008.

Because of the length of time between the filing of the Motion to Dismiss and the Order granting the Motion to Dismiss, numerous depositions were taken. Additionally, Petitioner moved to amend her Complaint because she was made whole by the retailers. The adoption of certain Local Rules of Procedure and changes in the Ohio Public Records Law made Petitioner Lambert's initial claims moot. (Doc. 29). The only remaining request for relief by Petitioner Lambert, in a proposed Amended Complaint, is that she be provided with credit monitoring. The District Court did not use the facts developed in the depositions to rule on the Motion to Dismiss. The District Court did not grant leave to file the proposed Amended Complaint.

The Sixth Circuit did discuss whether a case and controversy remained after Ohio law changed and the retailers made Petitioner Lambert whole from monetary losses. Based upon the unfiled proposed Amended Complaint, the Sixth Circuit concluded that a case and controversy remained.

ARGUMENT

The considerations governing this Court's jurisdiction on a writ of certiorari are enumerated in Rule 10 of the Rules of the Supreme Court of the United States. That rule clearly states, in relevant part, "A petition for a writ of certiorari will only be granted for compelling reasons." Although Petitioner attempts to style her issue as meeting many of the items included in Rule 10 regarding the character of the reasons that this Court would grant a writ of certiorari, a close reading of Petitioner's Brief clearly demonstrates that she is not complaining about what was put in the public record. This is a matter upon which the circuit courts of appeal may differ. Instead, Petitioner is asking this court to issue a constitutional ruling about the format used to make the public records available to the public. The circuit courts of appeal and the cases decided by this Court make no such distinction.

I. Petitioner Lambert lacks standing to bring this action in the District Court because she was made financially whole by the retailers and Ohio law has changed to authorize removal of the contested information in the official documents posted on Respondent Hartmann's website.

Standing is arguably "...the most important of the [Article III] doctrines." *Allen v. Wright*, 468 U.S. 737, 751, 104 S.Ct. 3315, 3324, 82 L.Ed 2d. 556 (1984). The elements of standing under Article III require that a plaintiff must show "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 119 L. Ed.2d 351, 112 S.Ct. 2130 (1992). Also, see *County of Los Angeles v. Davis*, 440 U.S. 625, 59 L.Ed. 642, 99 S.Ct. 1379 (1979); *O'Shea v. Littleton*, 414 U.S. 488, 494, 38 L.Ed.2d 674, 94 S.Ct. 669 (1974) ("Abstract injury is not enough."). This Court has made clear that a federal district court lacks jurisdiction over a case if a plaintiff does not meet the threshold requirements of standing imposed by Article III:

> Plaintiffs in the federal courts "must allege some threatened or actual injury resulting from the putatively illegal actions *before* a federal court may assume jurisdiction."

O'Shea, 414 U.S. at 493 (emphasis supplied); *see also City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). Standing must exist when the Complaint is filed.

Cleveland Branch, NAACP v. City of Parma, 263 F.3d 513, 525-26 (6th Cir. 2001).

Standing requirements cannot be waived. Standing can be raised at *any* time by a defendant and, even if the defendant does not raise the issue, the federal courts must do so.

> Even if no party raises the propriety of plaintiffs' standing, we "are under an independent obligation to examine [our] own jurisdiction, and standing is perhaps the most important of [the jurisdictional] doctrines."

United States v. Hays, 515 U.S. 737, 742 (1995), citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 230-231, 107 L. Ed.2d 603, 110 S.Ct. 596 (1990). Finally, the parties to a lawsuit do not have the power, either by agreement or mistake, to confer jurisdiction upon a court by conceding the standing of a plaintiff. *Cleveland Branch, NAACP v. City of Parma*, 263 F.3d 513, 525-26 (6th Cir. 2001) ("...[Standing] cannot be bestowed if it does not exist on its own"); *Barhold v. Rodriguez*, 863 F.2d 233, 234 (2d Cir. 1988); *Wilson v. Glenwood Intermountain Properties*, 98 F.3d 590, 593 (10th Cir. 1996). Also see, *Valley Forge Christian College v. Americans United For Separation*, 454 U.S. 464 (1982), quoting *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 at 227 (1974) ("...the assumption that if respondents have no standing to sue, no one would have standing, is not reason to find standing.").

In the instant case, the subsequent proposed amended Complaint makes clear that Sam's Club and the Home Depot made Petitioner Lambert whole, financially. Respondent Hartmann convened a task

force, prior to the filing of this action in the District Court, to review the availability of public court records via the website. The task force recommended the adoption of a local rule by the Hamilton County courts. Local Rule of Common Pleas, subsequently adopted in July of 2005, addressed remote public access to sensitive information, including SSN's, on the website.

Subsequent to the adoption of this Local Rule the Ohio Supreme Court reversed its prior ruling and found that SSN's were not "records" for purposes of Ohio Public Records law.[3] Prior to this directive from the Ohio Supreme Court the only method to alter such a record or seal it was by obtaining a court order.

The Sixth Circuit found that there was no actual monetary financial injury. The steps taken by the Ohio Courts reduce the on-line acquisition of personal identifiers from the Internet. The Sixth Circuit, however, found that a case and controversy still existed because ". . .if Lambert were able to prove that she continues to face an increased risk of identity theft, she could likely show that monitoring suspicious activity on her credit report would not only combat that future risk, but would help to redress the past financial injury that she suffered." In short, the Sixth Circuit found a case and controversy by speculating that maybe someone else in the future might steal Lambert's personal identifiers from the Respondent Hartmann's website. Maybe that thief would use the

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[3] The first case in Ohio to suggest the redaction of social security numbers was *State ex. rel Highlander v. Ruddick*, 103 Ohio St. 3d 370, 816 N.E.2d 213 (2004), where the Supreme Court granted a writ of mandamus for public records, but honored the petitioner's request to redact SSN.

information to again induce Home Depot and Sam's club to extend credit to someone impersonating Petitioner Lambert. In that case Home Depot and Sam's Club could again make Petitioner Lambert financially whole.[4]

This alleged injury or threat of injury was not "real or immediate;" rather, it was purely conjectural. *Valley Forge*, 454 U.S. 464 at 485-86 (emphasis in original) ("They fail to identify any personal injury suffered by them *as a consequence* of the alleged unconstitutionality, other than the psychological consequence presumably produced by observation of conduct with which one disagrees."); *Schlesinger*, 418 U.S. at 218 (emphasis supplied) ("...whatever the 'case or controversy' requirement embodied, its essence is a requirement of '*injury in fact*.'")

In short, Petitioner Lambert is not and has not suffered an injury. She is not under the threat of "real and immediate injury." Rather, Petitioner Lambert's claimed future injury is entirely "conjectural" and "hypothetical".

In Steel Co. v. *Citizens for Better Environment*, 523 U.S. 83, 140 L. Ed. 2d 210, 118 S. Ct. 1003 (1998), this Court adhered to the rule that a federal court may not hypothesize subject-matter jurisdiction for the purpose of deciding the merits. Steel Co. rejected a doctrine, once approved by several Courts of Appeals, that

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[4] The proposed Amended Complaint alleges that Petitioner Lambert took the steps to "insure that she will not be held liable for any unauthorized charges." Proposed Amended Complaint ¶ 14

allowed federal tribunals to pretermit jurisdictional objections "where (1) the merits question is more readily resolved, and (2) the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied." 523 U.S. at 93. Recalling "a long and venerable line of our cases," 523 U.S. at 94, *Steel Co.* reiterated: "The requirement that jurisdiction be established as a threshold matter . . . is 'inflexible and without exception,'" 523 U.S. at 94-95 (quoting *Mansfield, C. & L. M. R. Co.* v. *Swan*, 111 U.S. 379, 382, 28 L. Ed. 462, 4 S. Ct. 510 (1884)); for "jurisdiction is power to declare the law," and "'without jurisdiction the court cannot proceed at all in any cause,'" 523 U.S. at 94 (quoting *Ex parte McCardle*, 74 U.S. 506, 7 Wall. 506, 514, 19 L. Ed. 264 (1869)).

This Court should not grant certiorari because there is no longer a case and controversy between the Petitioner Lambert and the Respondents.

II. Once personal identifiers are part of a Complaint and Summons in a criminal case and the defendant makes no request to the trial court to seal or redact the public record of the criminal case, no violation of the constitutional right of privacy occurs when the public information is made available on the Internet.

Petitioner's claims against Respondents are summed up in the class action allegations in paragraph 23 of the Complaint which states:

> 23. Plaintiff's claim is typical of the claims of the putative class. Plaintiff and all members of

> the putative class have been damaged in that private information has been published on the Clerk of Court's wbsite.

It is not specifically identifying the criminal defendant in the public record that is the alleged wrong. Instead, it is the publication of that information on the county's website that is the alleged wrong in this case.

This Court in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) held that the public has a right to open access to criminal trials and the right can only be abridged by particularized findings by a trial court. This Court explained:

> We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated." *Branzburg*, 408 U.S., at 681, 92 S.Ct., at 2656.
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> * * *
>
> Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.

In this case, the charging instrument, the traffic ticket, contained Petitioner's personal identifiers. There is no allegation by Petitioner that the trial court in the criminal case found any overriding confidentiality in the records of the criminal case.

In *Cox Broadcasting v. Cohn* 420 U.S. 469 (1975), this Court had before it a case where the name of a rape victim was published by a newspaper after it appeared in official court records. This Court determined that once the information appears in official court records that are open to the public, they are public and may be published. This Court explained:

> By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business. In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.

Thus, once the material concerning a criminal trial is in the public record, it is public and may be published in any form.

In this case, Petitioner does not complain about the requirement of the Ohio Traffic Rules that the Complaint and Summons contain personal identifiers

and the signature of the accused. Petitioner does not complain that in Ohio, the charging documents in a criminal case are public record. Instead, Petitioner is solely concerned with the decision of the predecessor of Respondent Hartmann to make those public records available to the public in electronic format on the Internet.

The prior caselaw of this Court on the issue of public records is simple: once a matter is in the public record it is just that, public. Petitioner would have this Court refine this simple concept to hold that some emanation or penumbra of the United States Constitution makes a distinction between records made public in paper form and records made public electronically. No case ever decided by this Court hints that such a distinction has constitutional dimension.

III. The Fourteenth Amendment to the Constitution of the United States does not create a right to privacy in a person's name, social security number, address, driver's license number, physical description, birth date and signature.

The Sixth Circuit has limited the informational privacy interest protected by the Fourteenth Amendment to two circumstances. One circumstance is the type of information that could lead to personal harm. The second is the type of information which is sexual, personal, and humiliating in nature. The Sixth Circuit explained in its opinion below that it reached this determination by construing *Whalen v. Roe* 429 U.S. 589, 599-600 and footnote 26 (1977) and *Nixon v. Adm'r of Gen. Servs* 433 U.S.425, 465 (1977) as

extending the right of informational privacy only to interests that implicate a fundamental liberty interest.

Petitioner Lambert does not attack the compelling interest of the state in requiring positive identification of those charged with violating traffic laws. Petitioner Lambert does not challenge the requirements of traffic tickets set out in the Ohio Traffic Rules. Instead, Petitioner Lambert claims, that her privacy interest in her personal identifying information should be determined by employing a "reasonable expectation of privacy" analysis. The Sixth Circuit acknowledged in its opinion that other circuit courts of appeal have used this approach.

This case, however, is not illustrative of the distinct approaches used by various circuit courts to determine the extent and nature of one's informational privacy. It is clear that "personal identifiers", using the Sixth Circuit's analysis, do not have constitutional privacy protection as they do not involve questions of fundamental rights as defined by this Court. Likewise, Petitioner Lambert could not show a reasonable objective expectation of privacy that would justify keeping her "personal identifiers from the public record. She was charged with a violation of traffic laws. Once that occurred, she had no reasonable expectation that information sufficient to identify her would be withheld from the public record. It is undoubtedly inconvenient and embarrassing for persons charged with even petty crimes such as theft, drug abuse, disorderly conduct, prostitution, or voyeurism to be sufficiently identified in the public record so that the public knows which John Smith or which Jane Jones was charged. But, a person cannot have a reasonable expectation that he can remain

anonymous while criminal charges are pending against him.[5]

This is not a case where credit card numbers, bank account numbers, or passwords used by Petitioner were placed in the public record gratuitously. Instead, Petitioner Lambert complains that her name, social security number, address, incorrect driver's license number, physical description, and birth date and signature were placed in the public record by the filing of her traffic ticket with the clerk of courts. All of these identifiers are either in the public record or have been assigned by public entities. One must provide this information to a bureau of motor vehicles to obtain a driver's license. One's birth date is recorded with the bureau of vital statistics. One must display one's personal identifiers to buy alcohol or cigarettes, vote, obtain credit, contract, drive, or collect various governmental benefits. One's address is undoubtedly on voter roles or in a county recorder's office. One's physical description is displayed in public. One's signature facsimile is displayed regularly on voter roles and on checks, credit cards and credit card receipts. In short, all of these personal identifiers are used and displayed in the every day commerce.

Left are the social security number and the incorrect driver's license number. A person has no legitimate privacy interest in a fake driver's license number. Social Security Numbers are published on

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[5] In fact in this case, Petitioner Lambert initially did not pay the traffic ticket. A warrant issued for her arrest. Clearly, Petitioner Lambert's personal identifiers were critical to prevent passive identity theft, i.e., the arrest of the wrong "Cynthia Lambert".

federal and state tax liens by county recorder's offices throughout most states. The Privacy Act of 1974 provides:

> [N]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, . . . unless disclosure of the record would be . . . for a routine use. 5 U.S.C.A. §552a(b)

The use of the social security number on a traffic ticket is a routine use. A routine use is one that is for a necessary purpose. The identification of the individual subject charged with a traffic violation is a necessary purpose and, therefore, a routine use.. The charging document, the traffic ticket, was filed with the Clerk. At the filing of the document (actually at its creation) it became a public record. The publication of public documents is a routine use of that information.

In short, Petitioner Lambert had no reasonable expectation of privacy in the information routinely placed on every traffic ticket in the state of Ohio.

IV. Respondents are protected from claims for monetary damages by the eleventh amendment.

It is well established that states and state officers acting in their official capacities are immune from suits for damages in federal court, see *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974); *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989). In most cases, where county officials are using discretion to

carry out their county functions, the Eleventh Amendment "does not extend to counties and similar municipalities." *Mt Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280, 97 S.Ct. 568, 50 L.Ed.2d 471 (1977).

If, however, the County Official is merely carrying out a state mandate, the county official is entitled to Eleventh Amendment immunity. "Where county officials are sued simply for complying with state mandates that afford no discretion, they act as an arm of the State." *Brotherton v. Cleveland*, 173 F.3d 552, 566 (6th Cir. 1999) (citations omitted). See also *Scott v. O'Grady*, 975 F.2d 366, 371 (7th Cir. 1992)(holding that county official acted as arm of the State where official merely executed writ pursuant to state non-discretionary duty), cert. denied, 508 U.S. 942, 113 S.Ct. 2421, 124 L.Ed.2d 643 (1993); *Echols v. Parker*, 909 F.2d 795, 801 (5th Cir. 1990) (finding that local officials acted as State agents when they enforced a State anti-boycott statute by prosecuting boycotters, stating: "[a] county official pursues his duty as a state agent when he is enforcing state law or policy.")

After the Complaint in this case was filed, the Ohio Courts limited disclosure of social security numbers and other personal identifiers. The proposed Amended Complaint now only seeks (though styled in terms of injunctive relief) the cost of credit monitoring from the Respondents.

Equally clear is that the traffic ticket contained Petitioner Lambert's personal identifiers and that Respondent Hartmann accepted the traffic ticket for filing as was required by the Ohio Traffic Rules. Ohio Court Rules of Procedure, including the Ohio Traffic

Rules, are creations of the Ohio Supreme Court. See Ohio Traffic Rule 1(B). No discretion was given to Respondent Hartmann to refuse to accept the ticket for filing. See Ohio Traffic Rule 3(C). At the time the traffic ticket was filed, no provision of the Ohio Public Records Act gave Respondent Hartmann authority to alter the Court records in his possession or to refuse to provide them upon request to the public.

Clearly, Respondent Hartmann performed non-discretionary functions, required of him by state law. Under the Eleventh Amendment, Respondents are immune from suit for the only remaining claim of Petitioner Lambert, payment of the cost to monitor her credit.

CONCLUSION

Whether the Sixth Circuit or other Circuit Courts of Appeal properly interpret *Whalen v. Roe* 429 U.S. 589, 599-600 and footnote 26 (1977) and *Nixon v. Adm'r of Gen. Servs* 433 U.S.425, 465 (1977) makes no real difference to the resolution of this case. Under either test, the result is the same. The issue raised in the Petition for a Writ of Certiorari is not a matter of great legal importance and there are no compelling reasons to grant the Petition. The Writ of Certiorari should be denied.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENTS

APPENDIX

APPENDIX A

Constitution of the United States

Amendment XI. Suits Against States

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

APPENDIX B

Constitution of the United States

Amendment XIV. Citizenship; Privileges and Immunities; Due Process; Equal Protection; Appointment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other

crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX C

United States Code
Title 5. Government Organization and Employees
Part I. The Agencies Generally
Chapter 5. Administrative Procedure
Subchapter II. Administrative Procedure

5 U.S.C. § 552a. Records maintained on individuals

(a) Definitions.--For purposes of this section--

(1) the term "agency" means agency as defined in section 552(e) of this title;

(2) the term "individual" means a citizen of the United States or an alien lawfully admitted for permanent residence;

(3) the term "maintain" includes maintain, collect, use, or disseminate;

(4) the term "record" means any item, collection, or grouping of information about an individual that is maintained by an agency, including, but not limited to, his education, financial transactions, medical history, and criminal or employment history and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph;

(5) the term "system of records" means a group of any records under the control of any agency from which information is retrieved by the name of the individual or by some identifying number, symbol, or other identifying particular assigned to the individual;

(6) the term "statistical record" means a record in a system of records maintained for statistical research or reporting purposes only and not used in whole or in part in making any determination about an identifiable individual, except as provided by section 8 of title 13;

(7) the term "routine use" means, with respect to the disclosure of a record, the use of such record for a purpose which is compatible with the purpose for which it was collected;

(8) the term "matching program"--

(A) means any computerized comparison of--

(i) two or more automated systems of records or a system of records with non-Federal records for the purpose of--

(I) establishing or verifying the eligibility of, or continuing compliance with statutory and regulatory requirements by, applicants for, recipients or beneficiaries of, participants in, or providers of services with respect to, cash or in-kind assistance or payments under Federal benefit programs, or

(II) recouping payments or delinquent debts under such Federal benefit programs, or

(ii) two or more automated Federal personnel or payroll systems of records or a system of Federal personnel or payroll records with non-Federal records,

(B) but does not include--

(i) matches performed to produce aggregate statistical data without any personal identifiers;

(ii) matches performed to support any research or statistical project, the specific data of which may not be used to make decisions concerning the rights, benefits, or privileges of specific individuals;

(iii) matches performed, by an agency (or component thereof) which performs as its principal function any activity pertaining to the enforcement of criminal laws, subsequent to the initiation of a specific criminal or civil law enforcement investigation of a named person or persons for the purpose of gathering evidence against such person or persons;

(iv) matches of tax information (I) pursuant to section 6103(d) of the Internal Revenue Code of 1986, (II) for purposes of tax administration as defined in section 6103(b)(4) of such Code, (III) for the purpose of intercepting a tax refund due an individual under authority granted by section 404(e), 464, or 1137 of the Social Security Act; or (IV) for the purpose of intercepting a tax refund due an individual under any other tax refund intercept program authorized by statute which has been

determined by the Director of the Office of Management and Budget to contain verification, notice, and hearing requirements that are substantially similar to the procedures in section 1137 of the Social Security Act;

(v) matches--

(I) using records predominantly relating to Federal personnel, that are performed for routine administrative purposes (subject to guidance provided by the Director of the Office of Management and Budget pursuant to subsection (v)); or

(II) conducted by an agency using only records from systems of records maintained by that agency;

if the purpose of the match is not to take any adverse financial, personnel, disciplinary, or other adverse action against Federal personnel

(vi) matches performed for foreign counterintelligence purposes or to produce background checks for security clearances of Federal personnel or Federal contractor personnel;

(vii) matches performed incident to a levy described in section 6103(k)(8) of the Internal Revenue Code of 1986; or

(viii) matches performed pursuant to section 202(x)(3) or 1611(e)(1) of the Social Security Act (42 U.S.C. 402(x)(3), 1382(e)(1));

(9) the term "recipient agency" means any agency, or contractor thereof, receiving records contained in a system of records from a source agency for use in a matching program;

(10) the term "non-Federal agency" means any State or local government, or agency thereof, which receives records contained in a system of records from a source agency for use in a matching program;

(11) the term "source agency" means any agency which discloses records contained in a system of records to be used in a matching program, or any State or local government, or agency thereof, which discloses records to be used in a matching program;

(12) the term "Federal benefit program" means any program administered or funded by the Federal Government, or by any agent or State on behalf of the Federal Government, providing cash or in-kind assistance in the form of payments, grants, loans, or loan guarantees to individuals; and

(13) the term "Federal personnel" means officers and employees of the Government of the United States, members of the uniformed services (including members of the Reserve Components), individuals entitled to receive immediate or deferred retirement benefits under any retirement program of the Government of the United States (including survivor benefits).

(b) Conditions of disclosure.--No agency shall disclose any record which is contained in a system of records by any means of communication to any person,

or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be--

(1) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties;

(2) required under section 552 of this title;

(3) for a routine use as defined in subsection (a)(7) of this section and described under subsection (e)(4)(D) of this section;

(4) to the Bureau of the Census for purposes of planning or carrying out a census or survey or related activity pursuant to the provisions of title 13;

(5) to a recipient who has provided the agency with advance adequate written assurance that the record will be used solely as a statistical research or reporting record, and the record is to be transferred in a form that is not individually identifiable;

(6) to the National Archives and Records Administration as a record which has sufficient historical or other value to warrant its continued preservation by the United States Government, or for evaluation by the Archivist of the United States or the designee of the Archivist to determine whether the record has such value;

(7) to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or criminal law

enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

(8) to a person pursuant to a showing of compelling circumstances affecting the health or safety of an individual if upon such disclosure notification is transmitted to the last known address of such individual;

(9) to either House of Congress, or, to the extent of matter within its jurisdiction, any committee or subcommittee thereof, any joint committee of Congress or subcommittee of any such joint committee;

(10) to the Comptroller General, or any of his authorized representatives, in the course of the performance of the duties of the Government Accountability Office;

(11) pursuant to the order of a court of competent jurisdiction; or

(12) to a consumer reporting agency in accordance with section 3711(e) of title 31.

* * *

APPENDIX D

Baldwin's Ohio Revised Code
Title I. State Government
Chapter 149. Documents, Reports, and Records
Records Commissions

149.43 Availability of public records; mandamus action; training of public employees; public records policy; bulk commercial special extraction requests

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code. "Public record" does not mean any of the following:

(a) Medical records;

(b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;

(c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 of the Revised

Code and to appeals of actions arising under those sections;

(d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under section 3705.12 of the Revised Code;

(e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;

(f) Records listed in division (A) of section 3107.42 of the Revised Code or specified in division (A) of section 3107.52 of the Revised Code;

(g) Trial preparation records;

(h) Confidential law enforcement investigatory records;

(i) Records containing information that is confidential under section 2710.03 or 4112.05 of the Revised Code;

(j) DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code;

(k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of section 5120.21 of the Revised Code;

(l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to section 5139.05 of the Revised Code;

(m) Intellectual property records;

(n) Donor profile records;

(o) Records maintained by the department of job and family services pursuant to section 3121.894 of the Revised Code;

(p) Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT residential and familial information;

(q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, information that constitutes a trade secret, as defined in section 1333.61 of the Revised Code;

(r) Information pertaining to the recreational activities of a person under the age of eighteen;

(s) Records provided to, statements made by review board members during meetings of, and all work products of a child fatality review board acting under sections 307.621 to 307.629 of the Revised Code, other than the report prepared pursuant to section 307.626 of the Revised Code;

(t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to section 5153.171 of the Revised Code other than the information released under that section;

(u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of examiners of nursing home administrators administers under section 4751.04 of the Revised Code or contracts under that section with a private or government entity to administer;

(v) Records the release of which is prohibited by state or federal law;

(w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under section 150.01 of the Revised Code;

(x) Information reported and evaluations conducted pursuant to section 3701.072 of the Revised Code;

(y) Financial statements and data any person submits for any purpose to the Ohio housing finance agency or the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency;

(z) Records listed in section 5101.29 of the Revised Code.

(2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

(3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

(4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the

independent thought processes and personal trial preparation of an attorney.

(5) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

(6) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.

(7) "Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT residential and familial information" means any information that discloses any of the following about a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT:

(a) The address of the actual personal residence of a peace officer, parole officer, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT, except for the state or political subdivision in which the peace officer, parole officer, assistant prosecuting attorney, correctional

employee, youth services employee, firefighter, or EMT resides;

(b) Information compiled from referral to or participation in an employee assistance program;

(c) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT;

(d) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT by the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's employer;

(e) The identity and amount of any charitable or employment benefit deduction made by the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's employer from the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's compensation unless the amount of the deduction is required by state or federal law;

(f) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT;

(g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer's appointing authority.

As used in divisions (A)(7) and (B)(9) of this section, "peace officer" has the same meaning as in section 109.71 of the Revised Code and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff.

As used in divisions (A)(7) and (B)(5)[1] of this section, "correctional employee" means any employee of the department of rehabilitation and correction who in the course of performing the employee's job duties has or has had contact with inmates and persons under supervision.

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[1] So in original; should this read "(B)(9)"?

As used in divisions (A)(7) and (B)(5)[2] of this section, "youth services employee" means any employee of the department of youth services who in the course of performing the employee's job duties has or has had contact with children committed to the custody of the department of youth services.

As used in divisions (A)(7) and (B)(9) of this section, "firefighter" means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

As used in divisions (A)(7) and (B)(9) of this section, "EMT" means EMTs-basic, EMTs-I, and paramedics that provide emergency medical services for a public emergency medical service organization. "Emergency medical service organization," "EMT-basic," "EMT-I," and "paramedic" have the same meanings as in section 4765.01 of the Revised Code.

(8) "Information pertaining to the recreational activities of a person under the age of eighteen" means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

(a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person's parent, guardian, custodian, or emergency contact person;

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[2] So in original; should this read "(B)(9)"?

(b) The social security number, birth date, or photographic image of a person under the age of eighteen;

(c) Any medical record, history, or information pertaining to a person under the age of eighteen;

(d) Any additional information sought or required about a person under the age of eighteen for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(9) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(10) "Post-release control sanction" has the same meaning as in section 2967.01 of the Revised Code.

(11) "Redaction" means obscuring or deleting any information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a "record" in section 149.011 of the Revised Code.

(12) "Designee" and "elected official" have the same meanings as in section 109.43 of the Revised Code.

(B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public

office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

(2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. A public office also shall have available a copy of its current records retention schedule at a location readily available to the public. If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which

records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing. The explanation shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section.

(4) Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested public record. Any requirement that the requester disclose the requestor's identity or the intended use of the requested public record constitutes a denial of the request.

(5) A public office or person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a

written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or person responsible for public records to identify, locate, or deliver the public records sought by the requester.

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. The public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy. Nothing in this section requires a public office or person responsible for the public record to allow the person seeking a copy of the public record to make the copies of the public record.

(7) Upon a request made in accordance with division (B) of this section and subject to division (B)(6) of this section, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail or by any other means of

delivery or transmission within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail or by any other means of delivery or transmission pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

In any policy and procedures adopted under this division, a public office may limit the number of records requested by a person that the office will transmit by United States mail to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

(8) A public office or person responsible for public records is not required to permit a person who is

incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

(9) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT and, if the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's spouse, former spouse, or child. The request

shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

As used in this division, "journalist" means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public.

(C)(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory damages under division (C)(1) of this section. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which

division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

If a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

The court may reduce an award of statutory damages or not award statutory damages if the court determines both of the following:

(a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(2)(a) If the court issues a writ of mandamus that orders the public office or the person responsible for the public record to comply with division (B) of this section and determines that the circumstances described in division (C)(1) of this section exist, the court shall determine and award to the relator all court costs.

(b) If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, the court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c) of this

section. The court shall award reasonable attorney's fees, subject to reduction as described in division (C)(2)(c) of this section when either of the following applies:

(i) The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section.

(ii) The public office or the person responsible for the public records promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

(c) Court costs and reasonable attorney's fees awarded under this section shall be construed as remedial and not punitive. Reasonable attorney's fees shall include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees. The court may reduce an award of attorney's fees to the relator or not award attorney's fees to the relator if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably

would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records as described in division (C)(2)(c)(i) of this section would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

(E)(1) To ensure that all employees of public offices are appropriately educated about a public office's obligations under division (B) of this section, all elected officials or their appropriate designees shall attend training approved by the attorney general as provided in section 109.43 of the Revised Code. In addition, all public offices shall adopt a public records policy in compliance with this section for responding to public records requests. In adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under section 109.43 of the Revised Code. Except as otherwise provided in this section, the policy may not limit the number of public records that the public office will make available to a single person, may not limit the number of public records that it will make available during a fixed period of time, and may

not establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours.

(2) The public office shall distribute the public records policy adopted by the public office under division (E)(1) of this section to the employee of the public office who is the records custodian or records manager or otherwise has custody of the records of that office. The public office shall require that employee to acknowledge receipt of the copy of the public records policy. The public office shall create a poster that describes its public records policy and shall post the poster in a conspicuous place in the public office and in all locations where the public office has branch offices. The public office may post its public records policy on the internet web site of the public office if the public office maintains an internet web site. A public office that has established a manual or handbook of its general policies and procedures for all employees of the public office shall include the public records policy of the public office in the manual or handbook.

(F)(1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.

(2) As used in division (F)(1) of this section:

(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or data base by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction request" does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.

(d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. "Special extraction costs" include any charges paid to a public agency for computer or records services.

(3) For purposes of divisions (F)(1) and (2) of this section, "surveys, marketing, solicitation, or resale for commercial purposes" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

APPENDIX E

Baldwin's Ohio Revised Code
Title XIX. Courts--Municipal--Mayor's--County
Chapter 1901. Municipal Court
Subject Matter Jurisdiction; Monetary Limits; Criminal Jurisdiction

1901.20 Criminal jurisdiction; appeals from noncriminal traffic violations

(A)(1) The municipal court has jurisdiction of the violation of any ordinance of any municipal corporation within its territory, unless the violation is required to be handled by a parking violations bureau or joint parking violations bureau pursuant to Chapter 4521. of the Revised Code, and of the violation of any misdemeanor committed within the limits of its territory. The municipal court has jurisdiction of the violation of a vehicle parking or standing resolution or regulation if a local authority, as defined in division (D) of section 4521.01 of the Revised Code, has specified that it is not to be considered a criminal offense, if the violation is committed within the limits of the court's territory, and if the violation is not required to be handled by a parking violations bureau or joint parking violations bureau pursuant to Chapter 4521. of the Revised Code. The municipal court, if it has a housing or environmental division, has jurisdiction of any criminal action over which the housing or environmental division is given jurisdiction by section 1901.181 of the Revised Code, provided that, except as specified in division (B) of that section, no

judge of the court other than the judge of the division shall hear or determine any action over which the division has jurisdiction. In all such prosecutions and cases, the court shall proceed to a final determination of the prosecution or case.

(2) A judge of a municipal court does not have the authority to dismiss a criminal complaint, charge, information, or indictment solely at the request of the complaining witness and over the objection of the prosecuting attorney, village solicitor, city director of law, or other chief legal officer who is responsible for the prosecution of the case.

(B) The municipal court has jurisdiction to hear felony cases committed within its territory. In all felony cases, the court may conduct preliminary hearings and other necessary hearings prior to the indictment of the defendant or prior to the court's finding that there is probable and reasonable cause to hold or recognize the defendant to appear before a court of common pleas and may discharge, recognize, or commit the defendant.

(C) A municipal court has jurisdiction of an appeal from a judgment or default judgment entered pursuant to Chapter 4521. of the Revised Code, as authorized by division (D) of section 4521.08 of the Revised Code. The appeal shall be placed on the regular docket of the court and shall be determined by a judge of the court.

APPENDIX F

Baldwin's Ohio Revised Code
Title XIX. Courts--Municipal--Mayor's--County
Chapter 1901. Municipal Court
Court Officials

1901.31 Clerks; deputy clerks; powers and duties

The clerk and deputy clerks of a municipal court shall be selected, be compensated, give bond, and have powers and duties as follows:

(A) There shall be a clerk of the court who is appointed or elected as follows:

(1)(a) Except in the Akron, Barberton, Toledo, Hamilton county, Portage county, and Wayne county municipal courts and through December 31, 2008, the Cuyahoga Falls municipal court, if the population of the territory equals or exceeds one hundred thousand at the regular municipal election immediately preceding the expiration of the term of the present clerk, the clerk shall be nominated and elected by the qualified electors of the territory in the manner that is provided for the nomination and election of judges in section 1901.07 of the Revised Code.

The clerk so elected shall hold office for a term of six years, which term shall commence on the first day of January following the clerk's election and continue until the clerk's successor is elected and qualified.

(b) In the Hamilton county municipal court, the clerk of courts of Hamilton county shall be the clerk of the municipal court and may appoint an assistant clerk who shall receive the compensation, payable out of the treasury of Hamilton county in semimonthly installments, that the board of county commissioners prescribes. The clerk of courts of Hamilton county, acting as the clerk of the Hamilton county municipal court and assuming the duties of that office, shall receive compensation at one-fourth the rate that is prescribed for the clerks of courts of common pleas as determined in accordance with the population of the county and the rates set forth in sections 325.08 and 325.18 of the Revised Code. This compensation shall be paid from the county treasury in semimonthly installments and is in addition to the annual compensation that is received for the performance of the duties of the clerk of courts of Hamilton county, as provided in sections 325.08 and 325.18 of the Revised Code.

(c) In the Portage county and Wayne county municipal courts, the clerks of courts of Portage county and Wayne county shall be the clerks, respectively, of the Portage county and Wayne county municipal courts and may appoint a chief deputy clerk for each branch that is established pursuant to section 1901.311 of the Revised Code and assistant clerks as the judges of the municipal court determine are necessary, all of whom shall receive the compensation that the legislative authority prescribes. The clerks of courts of Portage county and Wayne county, acting as the clerks of the Portage county and Wayne county municipal courts and assuming the duties of these offices, shall receive compensation payable from the county treasury in semimonthly installments at one-fourth the rate that

is prescribed for the clerks of courts of common pleas as determined in accordance with the population of the county and the rates set forth in sections 325.08 and 325.18 of the Revised Code.

(d) Except as otherwise provided in division (A)(1)(d) of this section, in the Akron municipal court, candidates for election to the office of clerk of the court shall be nominated by primary election. The primary election shall be held on the day specified in the charter of the city of Akron for the nomination of municipal officers. Notwithstanding any contrary provision of section 3513.05 or 3513.257 of the Revised Code, the declarations of candidacy and petitions of partisan candidates and the nominating petitions of independent candidates for the office of clerk of the Akron municipal court shall be signed by at least fifty qualified electors of the territory of the court.

The candidates shall file a declaration of candidacy and petition, or a nominating petition, whichever is applicable, not later than four p.m. of the seventy-fifth day before the day of the primary election, in the form prescribed by section 3513.07 or 3513.261 of the Revised Code. The declaration of candidacy and petition, or the nominating petition, shall conform to the applicable requirements of section 3513.05 or 3513.257 of the Revised Code.

If no valid declaration of candidacy and petition is filed by any person for nomination as a candidate of a particular political party for election to the office of clerk of the Akron municipal court, a primary election shall not be held for the purpose of nominating a candidate of that party for election to that office. If only one person files a valid declaration of candidacy

and petition for nomination as a candidate of a particular political party for election to that office, a primary election shall not be held for the purpose of nominating a candidate of that party for election to that office, and the candidate shall be issued a certificate of nomination in the manner set forth in section 3513.02 of the Revised Code.

Declarations of candidacy and petitions, nominating petitions, and certificates of nomination for the office of clerk of the Akron municipal court shall contain a designation of the term for which the candidate seeks election. At the following regular municipal election, all candidates for the office shall be submitted to the qualified electors of the territory of the court in the manner that is provided in section 1901.07 of the Revised Code for the election of the judges of the court. The clerk so elected shall hold office for a term of six years, which term shall commence on the first day of January following the clerk's election and continue until the clerk's successor is elected and qualified.

(e) Except as otherwise provided in division (A)(1)(e) of this section, in the Barberton municipal court, candidates for election to the office of clerk of the court shall be nominated by primary election. The primary election shall be held on the day specified in the charter of the city of Barberton for the nomination of municipal officers. Notwithstanding any contrary provision of section 3513.05 or 3513.257 of the Revised Code, the declarations of candidacy and petitions of partisan candidates and the nominating petitions of independent candidates for the office of clerk of the Barberton municipal court shall be signed by at least fifty qualified electors of the territory of the court.

The candidates shall file a declaration of candidacy and petition, or a nominating petition, whichever is applicable, not later than four p.m. of the seventy-fifth day before the day of the primary election, in the form prescribed by section 3513.07 or 3513.261 of the Revised Code. The declaration of candidacy and petition, or the nominating petition, shall conform to the applicable requirements of section 3513.05 or 3513.257 of the Revised Code.

If no valid declaration of candidacy and petition is filed by any person for nomination as a candidate of a particular political party for election to the office of clerk of the Barberton municipal court, a primary election shall not be held for the purpose of nominating a candidate of that party for election to that office. If only one person files a valid declaration of candidacy and petition for nomination as a candidate of a particular political party for election to that office, a primary election shall not be held for the purpose of nominating a candidate of that party for election to that office, and the candidate shall be issued a certificate of nomination in the manner set forth in section 3513.02 of the Revised Code.

Declarations of candidacy and petitions, nominating petitions, and certificates of nomination for the office of clerk of the Barberton municipal court shall contain a designation of the term for which the candidate seeks election. At the following regular municipal election, all candidates for the office shall be submitted to the qualified electors of the territory of the court in the manner that is provided in section 1901.07 of the Revised Code for the election of the judges of the court. The clerk so elected shall hold office for a term of six years, which term shall commence on the first day of

January following the clerk's election and continue until the clerk's successor is elected and qualified.

(f)(i) Through December 31, 2008, except as otherwise provided in division (A)(1)(f)(i) of this section, in the Cuyahoga Falls municipal court, candidates for election to the office of clerk of the court shall be nominated by primary election. The primary election shall be held on the day specified in the charter of the city of Cuyahoga Falls for the nomination of municipal officers. Notwithstanding any contrary provision of section 3513.05 or 3513.257 of the Revised Code, the declarations of candidacy and petitions of partisan candidates and the nominating petitions of independent candidates for the office of clerk of the Cuyahoga Falls municipal court shall be signed by at least fifty qualified electors of the territory of the court.

The candidates shall file a declaration of candidacy and petition, or a nominating petition, whichever is applicable, not later than four p.m. of the seventy-fifth day before the day of the primary election, in the form prescribed by section 3513.07 or 3513.261 of the Revised Code. The declaration of candidacy and petition, or the nominating petition, shall conform to the applicable requirements of section 3513.05 or 3513.257 of the Revised Code.

If no valid declaration of candidacy and petition is filed by any person for nomination as a candidate of a particular political party for election to the office of clerk of the Cuyahoga Falls municipal court, a primary election shall not be held for the purpose of nominating a candidate of that party for election to that office. If only one person files a valid declaration of candidacy

and petition for nomination as a candidate of a particular political party for election to that office, a primary election shall not be held for the purpose of nominating a candidate of that party for election to that office, and the candidate shall be issued a certificate of nomination in the manner set forth in section 3513.02 of the Revised Code.

Declarations of candidacy and petitions, nominating petitions, and certificates of nomination for the office of clerk of the Cuyahoga Falls municipal court shall contain a designation of the term for which the candidate seeks election. At the following regular municipal election, all candidates for the office shall be submitted to the qualified electors of the territory of the court in the manner that is provided in section 1901.07 of the Revised Code for the election of the judges of the court. The clerk so elected shall hold office for a term of six years, which term shall commence on the first day of January following the clerk's election and continue until the clerk's successor is elected and qualified.

(ii) Division (A)(1)(f)(i) of this section shall have no effect after December 31, 2008.

(g) Except as otherwise provided in division (A)(1)(g) of this section, in the Toledo municipal court, candidates for election to the office of clerk of the court shall be nominated by primary election. The primary election shall be held on the day specified in the charter of the city of Toledo for the nomination of municipal officers. Notwithstanding any contrary provision of section 3513.05 or 3513.257 of the Revised Code, the declarations of candidacy and petitions of partisan candidates and the nominating petitions of

independent candidates for the office of clerk of the Toledo municipal court shall be signed by at least fifty qualified electors of the territory of the court.

The candidates shall file a declaration of candidacy and petition, or a nominating petition, whichever is applicable, not later than four p.m. of the seventy-fifth day before the day of the primary election, in the form prescribed by section 3513.07 or 3513.261 of the Revised Code. The declaration of candidacy and petition, or the nominating petition, shall conform to the applicable requirements of section 3513.05 or 3513.257 of the Revised Code.

If no valid declaration of candidacy and petition is filed by any person for nomination as a candidate of a particular political party for election to the office of clerk of the Toledo municipal court, a primary election shall not be held for the purpose of nominating a candidate of that party for election to that office. If only one person files a valid declaration of candidacy and petition for nomination as a candidate of a particular political party for election to that office, a primary election shall not be held for the purpose of nominating a candidate of that party for election to that office, and the candidate shall be issued a certificate of nomination in the manner set forth in section 3513.02 of the Revised Code.

Declarations of candidacy and petitions, nominating petitions, and certificates of nomination for the office of clerk of the Toledo municipal court shall contain a designation of the term for which the candidate seeks election. At the following regular municipal election, all candidates for the office shall be submitted to the qualified electors of the territory of the court in the

manner that is provided in section 1901.07 of the Revised Code for the election of the judges of the court. The clerk so elected shall hold office for a term of six years, which term shall commence on the first day of January following the clerk's election and continue until the clerk's successor is elected and qualified.

(2)(a) Except for the Alliance, Auglaize county, Brown county, Columbiana county, Holmes county, Lorain, Massillon, and Youngstown municipal courts, in a municipal court for which the population of the territory is less than one hundred thousand, the clerk shall be appointed by the court, and the clerk shall hold office until the clerk's successor is appointed and qualified.

(b) In the Alliance, Lorain, Massillon, and Youngstown municipal courts, the clerk shall be elected for a term of office as described in division (A)(1)(a) of this section.

(c) In the Auglaize county, Brown county, and Holmes county municipal courts, the clerks of courts of Auglaize county, Brown county, and Holmes county shall be the clerks, respectively, of the Auglaize county, Brown county, and Holmes county municipal courts and may appoint a chief deputy clerk for each branch office that is established pursuant to section 1901.311 of the Revised Code, and assistant clerks as the judge of the court determines are necessary, all of whom shall receive the compensation that the legislative authority prescribes. The clerks of courts of Auglaize county, Brown county, and Holmes county, acting as the clerks of the Auglaize county, Brown county, and Holmes county municipal courts and assuming the duties of these offices, shall receive

compensation payable from the county treasury in semimonthly installments at one-fourth the rate that is prescribed for the clerks of courts of common pleas as determined in accordance with the population of the county and the rates set forth in sections 325.08 and 325.18 of the Revised Code.

(d) In the Columbiana county municipal court, the clerk of courts of Columbiana county shall be the clerk of the municipal court, may appoint a chief deputy clerk for each branch office that is established pursuant to section 1901.311 of the Revised Code, and may appoint any assistant clerks that the judges of the court determine are necessary. All of the chief deputy clerks and assistant clerks shall receive the compensation that the legislative authority prescribes. The clerk of courts of Columbiana county, acting as the clerk of the Columbiana county municipal court and assuming the duties of that office, shall receive in either biweekly installments or semimonthly installments, as determined by the payroll administrator, compensation payable from the county treasury at one-fourth the rate that is prescribed for the clerks of courts of common pleas as determined in accordance with the population of the county and the rates set forth in sections 325.08 and 325.18 of the Revised Code.

(3) During the temporary absence of the clerk due to illness, vacation, or other proper cause, the court may appoint a temporary clerk, who shall be paid the same compensation, have the same authority, and perform the same duties as the clerk.

(B) Except in the Hamilton county, Portage county, and Wayne county municipal courts, if a vacancy

occurs in the office of the clerk of the Alliance, Lorain, Massillon, or Youngstown municipal court or occurs in the office of the clerk of a municipal court for which the population of the territory equals or exceeds one hundred thousand because the clerk ceases to hold the office before the end of the clerk's term or because a clerk-elect fails to take office, the vacancy shall be filled, until a successor is elected and qualified, by a person chosen by the residents of the territory of the court who are members of the county central committee of the political party by which the last occupant of that office or the clerk-elect was nominated. Not less than five nor more than fifteen days after a vacancy occurs, those members of that county central committee shall meet to make an appointment to fill the vacancy. At least four days before the date of the meeting, the chairperson or a secretary of the county central committee shall notify each such member of that county central committee by first class mail of the date, time, and place of the meeting and its purpose. A majority of all such members of that county central committee constitutes a quorum, and a majority of the quorum is required to make the appointment. If the office so vacated was occupied or was to be occupied by a person not nominated at a primary election, or if the appointment was not made by the committee members in accordance with this division, the court shall make an appointment to fill the vacancy. A successor shall be elected to fill the office for the unexpired term at the first municipal election that is held more than one hundred twenty days after the vacancy occurred.

(C)(1) In a municipal court, other than the Auglaize county, the Brown county, the Columbiana county, the Holmes county, and the Lorain municipal courts, for

which the population of the territory is less than one hundred thousand, the clerk of the municipal court shall receive the annual compensation that the presiding judge of the court prescribes, if the revenue of the court for the preceding calendar year, as certified by the auditor or chief fiscal officer of the municipal corporation in which the court is located or, in the case of a county-operated municipal court, the county auditor, is equal to or greater than the expenditures, including any debt charges, for the operation of the court payable under this chapter from the city treasury or, in the case of a county-operated municipal court, the county treasury for that calendar year, as also certified by the auditor or chief fiscal officer. If the revenue of a municipal court, other than the Auglaize county, the Brown county, the Columbiana county, and the Lorain municipal courts, for which the population of the territory is less than one hundred thousand for the preceding calendar year as so certified is not equal to or greater than those expenditures for the operation of the court for that calendar year as so certified, the clerk of a municipal court shall receive the annual compensation that the legislative authority prescribes. As used in this division, "revenue" means the total of all costs and fees that are collected and paid to the city treasury or, in a county-operated municipal court, the county treasury by the clerk of the municipal court under division (F) of this section and all interest received and paid to the city treasury or, in a county-operated municipal court, the county treasury in relation to the costs and fees under division (G) of this section.

(2) In a municipal court, other than the Hamilton county, Portage county, and Wayne county municipal courts, for which the population of the territory is one

hundred thousand or more, and in the Lorain municipal court, the clerk of the municipal court shall receive annual compensation in a sum equal to eighty-five per cent of the salary of a judge of the court.

(3) The compensation of a clerk described in division (C)(1) or (2) of this section is payable in semimonthly installments from the same sources and in the same manner as provided in section 1901.11 of the Revised Code, except that the compensation of the clerk of the Carroll county municipal court is payable in biweekly installments.

(D) Before entering upon the duties of the clerk's office, the clerk of a municipal court shall give bond of not less than six thousand dollars to be determined by the judges of the court, conditioned upon the faithful performance of the clerk's duties.

(E) The clerk of a municipal court may do all of the following: administer oaths, take affidavits, and issue executions upon any judgment rendered in the court, including a judgment for unpaid costs; issue, sign, and attach the seal of the court to all writs, process, subpoenas, and papers issuing out of the court; and approve all bonds, sureties, recognizances, and undertakings fixed by any judge of the court or by law. The clerk may refuse to accept for filing any pleading or paper submitted for filing by a person who has been found to be a vexatious litigator under section 2323.52 of the Revised Code and who has failed to obtain leave to proceed under that section. The clerk shall do all of the following: file and safely keep all journals, records, books, and papers belonging or appertaining to the court; record the proceedings of the court; perform all other duties that the judges of the court may prescribe;

and keep a book showing all receipts and disbursements, which book shall be open for public inspection at all times.

The clerk shall prepare and maintain a general index, a docket, and other records that the court, by rule, requires, all of which shall be the public records of the court. In the docket, the clerk shall enter, at the time of the commencement of an action, the names of the parties in full, the names of the counsel, and the nature of the proceedings. Under proper dates, the clerk shall note the filing of the complaint, issuing of summons or other process, returns, and any subsequent pleadings. The clerk also shall enter all reports, verdicts, orders, judgments, and proceedings of the court, clearly specifying the relief granted or orders made in each action. The court may order an extended record of any of the above to be made and entered, under the proper action heading, upon the docket at the request of any party to the case, the expense of which record may be taxed as costs in the case or may be required to be prepaid by the party demanding the record, upon order of the court.

(F) The clerk of a municipal court shall receive, collect, and issue receipts for all costs, fees, fines, bail, and other moneys payable to the office or to any officer of the court. The clerk shall each month disburse to the proper persons or officers, and take receipts for, all costs, fees, fines, bail, and other moneys that the clerk collects. Subject to sections 3375.50 and 4511.193 of the Revised Code and to any other section of the Revised Code that requires a specific manner of disbursement of any moneys received by a municipal court and except for the Hamilton county, Lawrence county, and Ottawa county municipal courts, the clerk

shall pay all fines received for violation of municipal ordinances into the treasury of the municipal corporation the ordinance of which was violated and shall pay all fines received for violation of township resolutions adopted pursuant to section 503.52 or 503.53 or Chapter 504. of the Revised Code into the treasury of the township the resolution of which was violated. Subject to sections 1901.024 and 4511.193 of the Revised Code, in the Hamilton county, Lawrence county, and Ottawa county municipal courts, the clerk shall pay fifty per cent of the fines received for violation of municipal ordinances and fifty per cent of the fines received for violation of township resolutions adopted pursuant to section 503.52 or 503.53 or Chapter 504. of the Revised Code into the treasury of the county. Subject to sections 3375.50, 3375.53, 4511.19, and 5503.04 of the Revised Code and to any other section of the Revised Code that requires a specific manner of disbursement of any moneys received by a municipal court, the clerk shall pay all fines collected for the violation of state laws into the county treasury. Except in a county-operated municipal court, the clerk shall pay all costs and fees the disbursement of which is not otherwise provided for in the Revised Code into the city treasury. The clerk of a county-operated municipal court shall pay the costs and fees the disbursement of which is not otherwise provided for in the Revised Code into the county treasury. Moneys deposited as security for costs shall be retained pending the litigation. The clerk shall keep a separate account of all receipts and disbursements in civil and criminal cases, which shall be a permanent public record of the office. On the expiration of the term of the clerk, the clerk shall deliver the records to the clerk's successor. The clerk

shall have other powers and duties as are prescribed by rule or order of the court.

(G) All moneys paid into a municipal court shall be noted on the record of the case in which they are paid and shall be deposited in a state or national bank, or a domestic savings and loan association, as defined in section 1151.01 of the Revised Code, that is selected by the clerk. Any interest received upon the deposits shall be paid into the city treasury, except that, in a county-operated municipal court, the interest shall be paid into the treasury of the county in which the court is located.

On the first Monday in January of each year, the clerk shall make a list of the titles of all cases in the court that were finally determined more than one year past in which there remains unclaimed in the possession of the clerk any funds, or any part of a deposit for security of costs not consumed by the costs in the case. The clerk shall give notice of the moneys to the parties who are entitled to the moneys or to their attorneys of record. All the moneys remaining unclaimed on the first day of April of each year shall be paid by the clerk to the city treasurer, except that, in a county-operated municipal court, the moneys shall be paid to the treasurer of the county in which the court is located. The treasurer shall pay any part of the moneys at any time to the person who has the right to the moneys upon proper certification of the clerk.

(H) Deputy clerks of a municipal court other than the Carroll county municipal court may be appointed by the clerk and shall receive the compensation, payable in either biweekly installments or semimonthly installments, as determined by the payroll

administrator, out of the city treasury, that the clerk may prescribe, except that the compensation of any deputy clerk of a county-operated municipal court shall be paid out of the treasury of the county in which the court is located. The judge of the Carroll county municipal court may appoint deputy clerks for the court, and the deputy clerks shall receive the compensation, payable in biweekly installments out of the county treasury, that the judge may prescribe. Each deputy clerk shall take an oath of office before entering upon the duties of the deputy clerk's office and, when so qualified, may perform the duties appertaining to the office of the clerk. The clerk may require any of the deputy clerks to give bond of not less than three thousand dollars, conditioned for the faithful performance of the deputy clerk's duties.

(I) For the purposes of this section, whenever the population of the territory of a municipal court falls below one hundred thousand but not below ninety thousand, and the population of the territory prior to the most recent regular federal census exceeded one hundred thousand, the legislative authority of the municipal corporation may declare, by resolution, that the territory shall be considered to have a population of at least one hundred thousand.

(J) The clerk or a deputy clerk shall be in attendance at all sessions of the municipal court, although not necessarily in the courtroom, and may administer oaths to witnesses and jurors and receive verdicts.

APPENDIX G

Baldwin's Ohio Revised Code
Title XLV. Motor Vehicles--Aeronautics--Watercraft
Chapter 4507. Driver's License Law
General Provisions

4507.13 Contents of license; novice motorcycle operator

(A) The registrar of motor vehicles shall issue a driver's license to every person licensed as an operator of motor vehicles other than commercial motor vehicles. No person licensed as a commercial motor vehicle driver under Chapter 4506. of the Revised Code need procure a driver's license, but no person shall drive any commercial motor vehicle unless licensed as a commercial motor vehicle driver.

Every driver's license shall display on it the distinguishing number assigned to the licensee and shall display the licensee's name and date of birth; the licensee's residence address and county of residence; a color photograph of the licensee; a brief description of the licensee for the purpose of identification; a facsimile of the signature of the licensee as it appears on the application for the license; a notation, in a manner prescribed by the registrar, indicating any condition described in division (D)(3) of section 4507.08 of the Revised Code to which the licensee is subject; if the licensee has executed a durable power of attorney for health care or a declaration governing the use or continuation, or the withholding or withdrawal, of life-

sustaining treatment and has specified that the licensee wishes the license to indicate that the licensee has executed either type of instrument, any symbol chosen by the registrar to indicate that the licensee has executed either type of instrument; and any additional information that the registrar requires by rule. No license shall display the licensee's social security number unless the licensee specifically requests that the licensee's social security number be displayed on the license. If federal law requires the licensee's social security number to be displayed on the license, the social security number shall be displayed on the license notwithstanding this section.

The driver's license for licensees under twenty-one years of age shall have characteristics prescribed by the registrar distinguishing it from that issued to a licensee who is twenty-one years of age or older, except that a driver's license issued to a person who applies no more than thirty days before the applicant's twenty-first birthday shall have the characteristics of a license issued to a person who is twenty-one years of age or older.

The driver's license issued to a temporary resident shall contain the word "nonrenewable" and shall have any additional characteristics prescribed by the registrar distinguishing it from a license issued to a resident.

Every driver's or commercial driver's license displaying a motorcycle operator's endorsement and every restricted license to operate a motor vehicle also shall display the designation "novice," if the endorsement or license is issued to a person who is eighteen years of age or older and previously has not

been licensed to operate a motorcycle by this state or another jurisdiction recognized by this state. The "novice" designation shall be effective for one year after the date of issuance of the motorcycle operator's endorsement or license.

Each license issued under this section shall be of such material and so designed as to prevent its reproduction or alteration without ready detection and, to this end, shall be laminated with a transparent plastic material.

(B) Except in regard to a driver's license issued to a person who applies no more than thirty days before the applicant's twenty-first birthday, neither the registrar nor any deputy registrar shall issue a driver's license to anyone under twenty-one years of age that does not have the characteristics prescribed by the registrar distinguishing it from the driver's license issued to persons who are twenty-one years of age or older.

(C) Whoever violates division (B) of this section is guilty of a minor misdemeanor.

APPENDIX H

BALDWIN'S OHIO REVISED CODE
OHIO TRAFFIC RULES

→Traf R 1 Scope of rules; applicability; authority and construction

(A) Applicability

These rules prescribe the procedure to be followed in all courts of this state in traffic cases and supersede the "Ohio Rules of Practice and Procedure in Traffic Cases For All Courts Inferior To Common Pleas" effective January 1, 1969, and as amended on January 4, 1971, and December 7, 1972.

(B) Authority and construction

These rules are promulgated pursuant to authority granted the Supreme Court by R.C. 2935.17 and 2937.46. They shall be construed and applied to secure the fair, impartial, speedy and sure administration of justice, simplicity and uniformity in procedure, and the elimination of unjustifiable expense and delay.

Current with amendments received through 7/15/08

APPENDIX I

BALDWIN'S OHIO REVISED CODE
OHIO TRAFFIC RULES

→Traf R 3 Complaint and summons; form; use

(A) Traffic complaint and summons

In traffic cases, the complaint and summons shall be the "Ohio Uniform Traffic Ticket" as set out in the Appendix of Forms.

(B) Traffic complaint and summons form

The Ohio Uniform Traffic Ticket shall consist of four sheets, padded together and bound at the top or bottom edge. Each sheet shall be four and one-fourth inches in width and nine and one-half inches in length from a perforation below the binding to the bottom edge. The first sheet shall be white and the second sheet shall be canary yellow. Where an additional copy is needed by an agency, it may be added. The first and second sheets shall be at least fifteen pound paper.

The first sheet shall be the court record.

The second sheet shall be the abstract of court record for the Bureau of Motor Vehicles as required by section 4507.021 of the Revised Code. The second sheet may be omitted from the Ticket if the court reports violations to the Bureau by electronic or other means acceptable to the Bureau.

The third sheet shall be the defendant's copy.

The fourth sheet shall be the enforcement agency record.

A wrap-around may be added to the first sheet. The issuing authority may use the front and back of the wrap-around for any data or information it may require.

Each ticket sheet shall be perforated tab bound at the edge or end with carbon paper interleaved so that all carbon paper is securely bound to the tab and removable with it, or shall be on treated paper so that marking from the top sheet is transferred legibly to successive sheets in the group.

(C) Use of ticket

The Ohio Uniform Traffic Ticket shall be used in all moving traffic cases, but its use for parking and equipment violations is optional in each local jurisdiction. Any ticket properly issued to a law enforcement officer shall be accepted for filing and disposition in any court having jurisdiction over the offense alleged. An officer may include more than one alleged violation on a single ticket provided the alleged violations are numbered sequentially on the face of the ticket. An officer who completes a ticket at the scene of an alleged offense shall not be required to rewrite or type a new complaint as a condition of filing the ticket, unless the original complaint is illegible or does not state an offense. If a new complaint is executed, a copy shall be served upon defendant as soon as possible.

(D) Issuance of tickets to enforcement agency

The judge in a single-judge court, and the administrative judge in multi-judge courts, shall designate the issuing authority for tickets and prescribe the conditions of issuance and accountability. The issuing authority may be the clerk of the court, the violations clerk, or the enforcement agency of the municipality.

When a single enforcement agency, except the State Highway Patrol, regularly has cases in more than one court, the ticket used by the agency shall be issued through the court for adults in the most populous area in the jurisdiction of the agency. Tickets used by the State Highway Patrol shall be issued by the Superintendent of the State Highway Patrol.

(E) Duty of law enforcement officer

(1) A law enforcement officer who issues a ticket shall complete and sign the ticket, serve a copy of the completed ticket on the defendant, and, without unnecessary delay, file the court copy with the court. If the issuing officer personally serves a copy of the completed ticket on the defendant, the issuing officer shall note the date of personal service on the ticket in the space provided. If the issuing officer is unable to serve a copy of the completed ticket on the defendant, the completed ticket may be served by another law enforcement officer of the law enforcement agency issuing the ticket or filed with the clerk of the court for issuance of a warrant or summons pursuant to Crim. R. 4. Tickets that solely allege one or more minor misdemeanor violations must initially be issued by summons.

(2) The officer shall notify defendant that if defendant does not appear at the time and place stated in the citation or comply with division (C) of section 2935.26 of the Revised Code, defendant's license will be cancelled, defendant will not be eligible for the reissuance of the license or the issuance of a new license for one year after cancellation, and defendant will be subject to any applicable criminal penalties.

(F) Use of Electronically Produced Tickets

(1) Local rules adopted pursuant to the Supreme Court Rules of Superintendence for the Courts of Ohio may provide for the use of a ticket that is produced by computer or other electronic means, provided that the ticket conforms in all substantive respects, including layout and content, to the "Ohio Uniform Traffic Ticket" set forth in the Appendix of Forms. The provisions of division (B) of this rule relative to the color and weight of paper and method of binding shall not be applicable to a ticket that is produced by computer or other electronic means.

(2) Local rules adopted pursuant to the Supreme Court Rules of Superintendence for the Courts of Ohio may provide for the filing of the ticket by electronic means. If a ticket is issued at the scene of an alleged offense, the local rule shall require that the issuing officer provide the defendant with a paper copy of the ticket as required by division (E) of this rule. A law enforcement officer who files a ticket electronically shall be considered to have certified the ticket and shall have the same rights, responsibilities, and liabilities as with all other tickets issued pursuant to these rules.

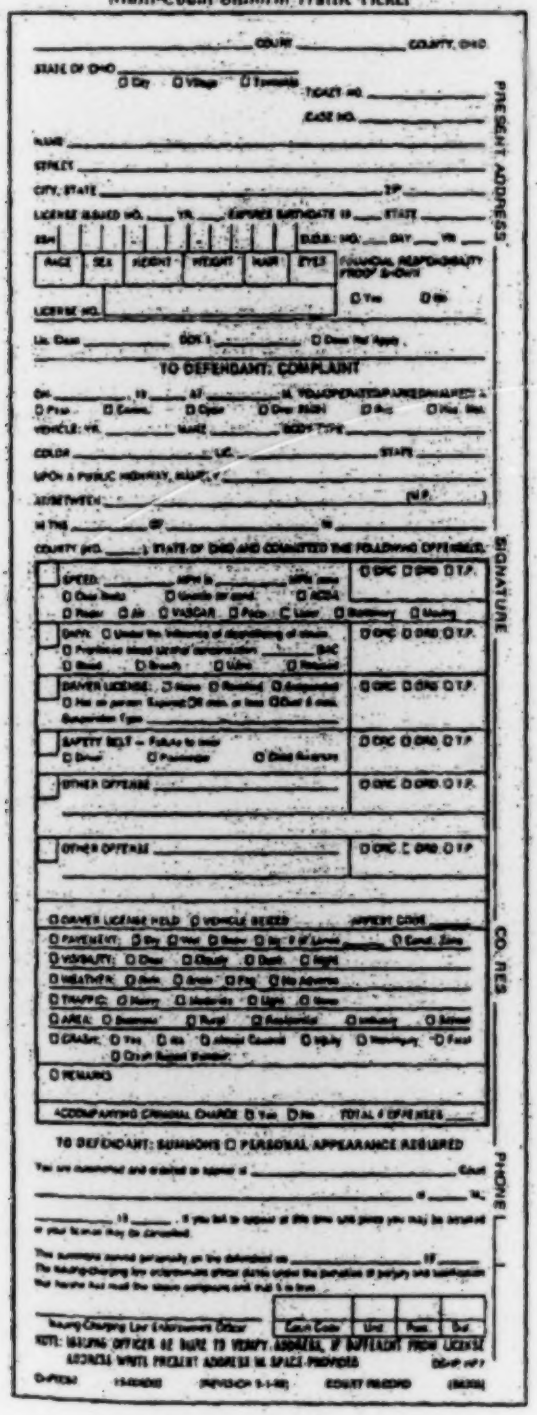
APPENDIX J

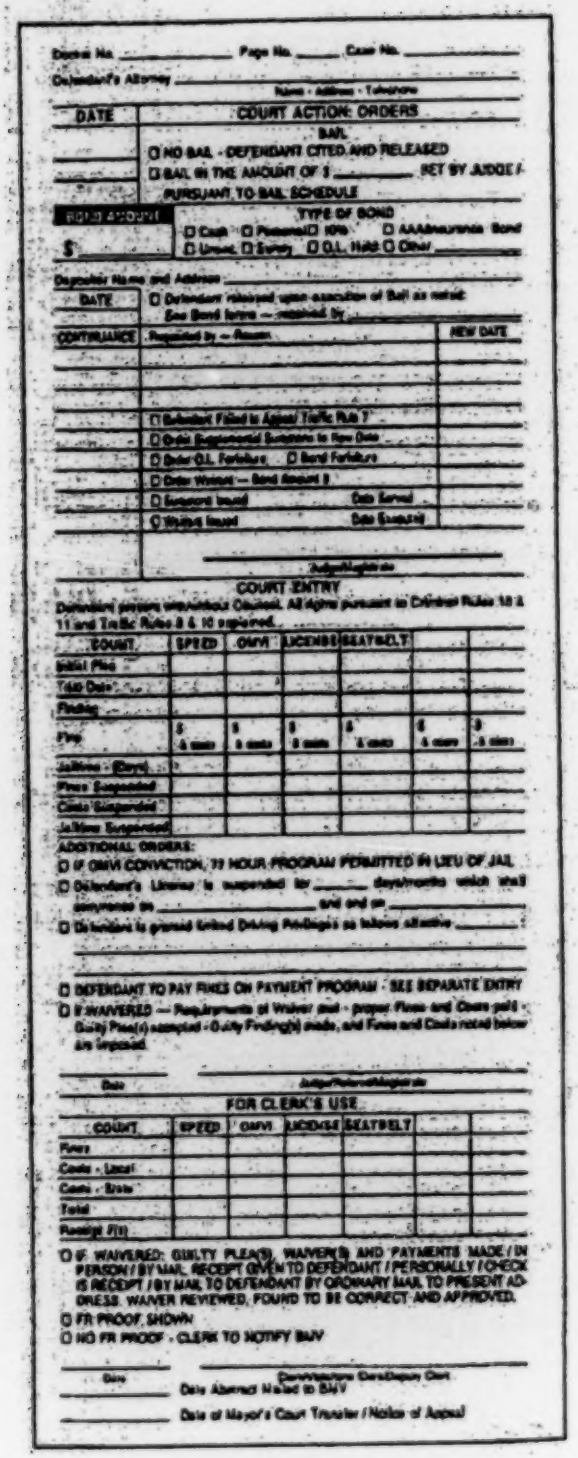
OHIO TRAFFIC RULES
UNIFORM TRAFFIC TICKET

[Fold-out exhibit, see next 7 pages]

BEST AVAILABLE COPY

Multi-Count Uniform Traffic Ticket





Docket No. _____ Page No. _____ Case No. _____

Defendant's Attorney _____
Name - Address - Telephone

DATE	COURT ACTION: ORDERS
	BAIL
	☐ NO BAIL - DEFENDANT CITED AND RELEASED
	☐ BAIL IN THE AMOUNT OF $ _____ SET BY JUDGE /
	PURSUANT TO BAIL SCHEDULE

BOND AMOUNT	TYPE OF BOND
$ _____	☐ Cash ☐ Personal ☐ 10% ☐ AAA Insurance Bond ☐ Unsec. ☐ Surety ☐ O.L. Hold ☐ Other _____

Depositor Name and Address _____

DATE	☐ Defendant released upon execution of Bail as noted: See Bond forms — received by _____

CONTINUANCE	Requested by — Reason	NEW DATE
	☐ Defendant Failed to Appear Traffic Rule 7	
	☐ Order Supplemental Summons to Now Date	
	☐ Order O.L. Forfeiture ☐ Bond Forfeiture	
	☐ Order Warrant — Bond Amount $	
	☐ Summons Issued Date Served	
	☐ Warrant Issued Date Executed	

_____
Judge/Magistrate

COURT ENTRY

Defendant pleads guilty/no contest. Court finds pursuant to Criminal Rules 10 & 11 and Traffic Rules 8 & 10 explained.

COUNT	SPEED	OMVI	LICENSE	SEATBELT		
Initial Plea						
Trial Date						
Finding						
Fine	$ & costs	$ & costs	$ & costs	$ & costs	$ & costs	$ & costs
Jail/Imp. - (Days)						
Fines Suspended						
Costs Suspended						
Jail/Imp. Suspended						

ADDITIONAL ORDERS:

☐ IF OMVI CONVICTION, 72 HOUR PROGRAM PERMITTED IN LIEU OF JAIL

☐ Defendant's License is suspended for _____ days/months which shall commence on _____ and end on _____

☐ Defendant is granted Limited Driving Privileges as follows effective _____:

_____

☐ DEFENDANT TO PAY FINES ON PAYMENT PROGRAM - SEE SEPARATE ENTRY

☐ If WAIVERED — Requirements of Waiver met - proper Fines and Costs paid - Guilty Plea(s) accepted - Guilty Finding(s) made, and Fines and Costs noted below are imposed.

_____ _____
Date Judge/Referee/Magistrate

FOR CLERK'S USE

COURT	SPEED	OMVI	LICENSE	SEATBELT		
Fines						
Costs - Local						
Costs - State						
Total						
Receipt #(s)						

☐ IF WAIVERED: GUILTY PLEA(S), WAIVER(S) AND PAYMENTS MADE / IN PERSON / BY MAIL. RECEIPT GIVEN TO DEFENDANT / PERSONALLY / CHECK IS RECEIPT / BY MAIL TO DEFENDANT BY ORDINARY MAIL TO PRESENT ADDRESS. WAIVER REVIEWED, FOUND TO BE CORRECT AND APPROVED.

☐ FR PROOF SHOWN

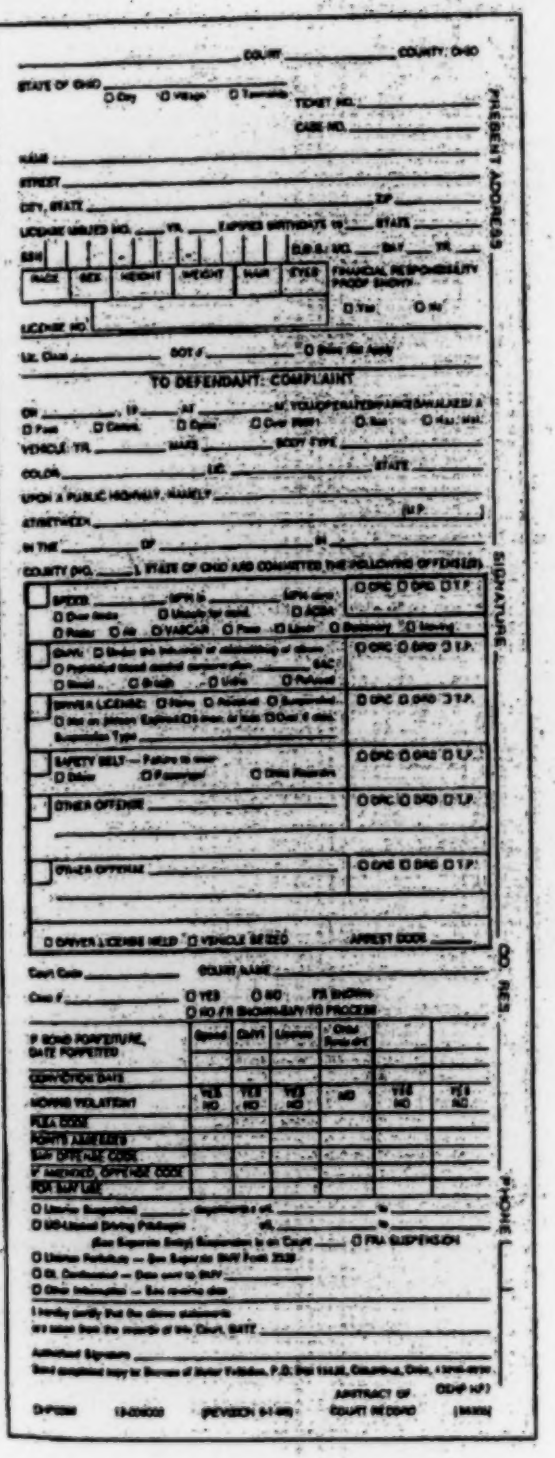
☐ NO FR PROOF - CLERK TO NOTIFY BMV

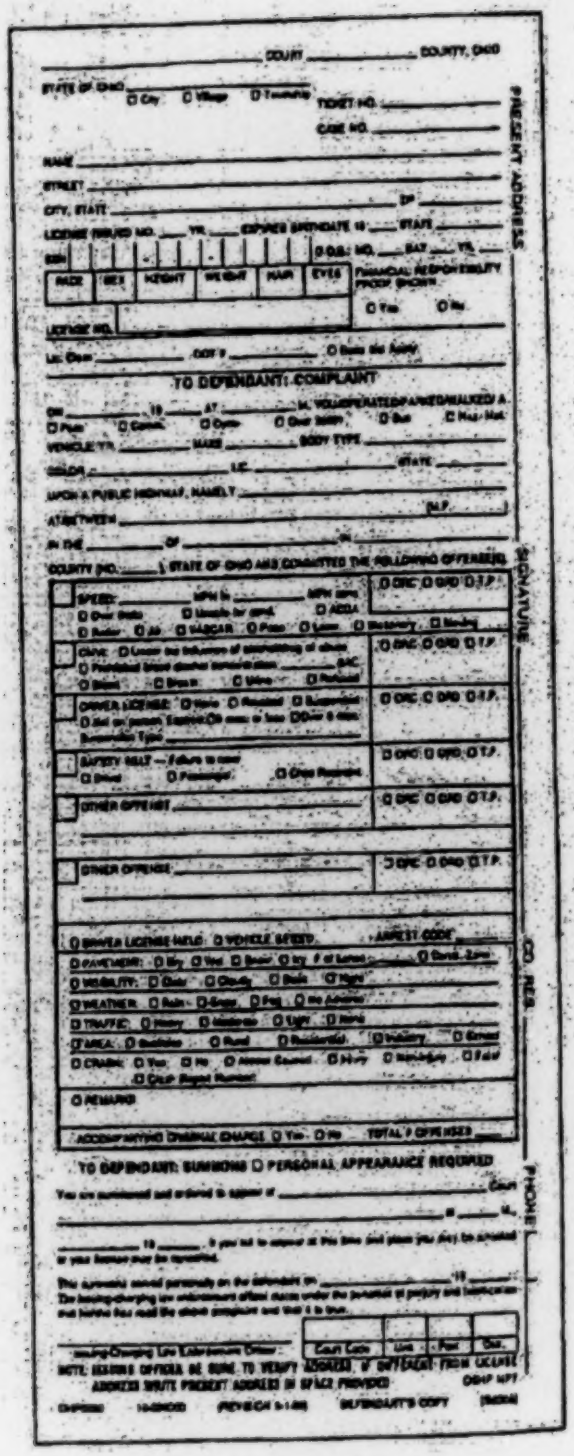
_____ _____
Date Clerk/Magistrate Clerk/Deputy Clerk

_____ Date Abstract Mailed to BMV

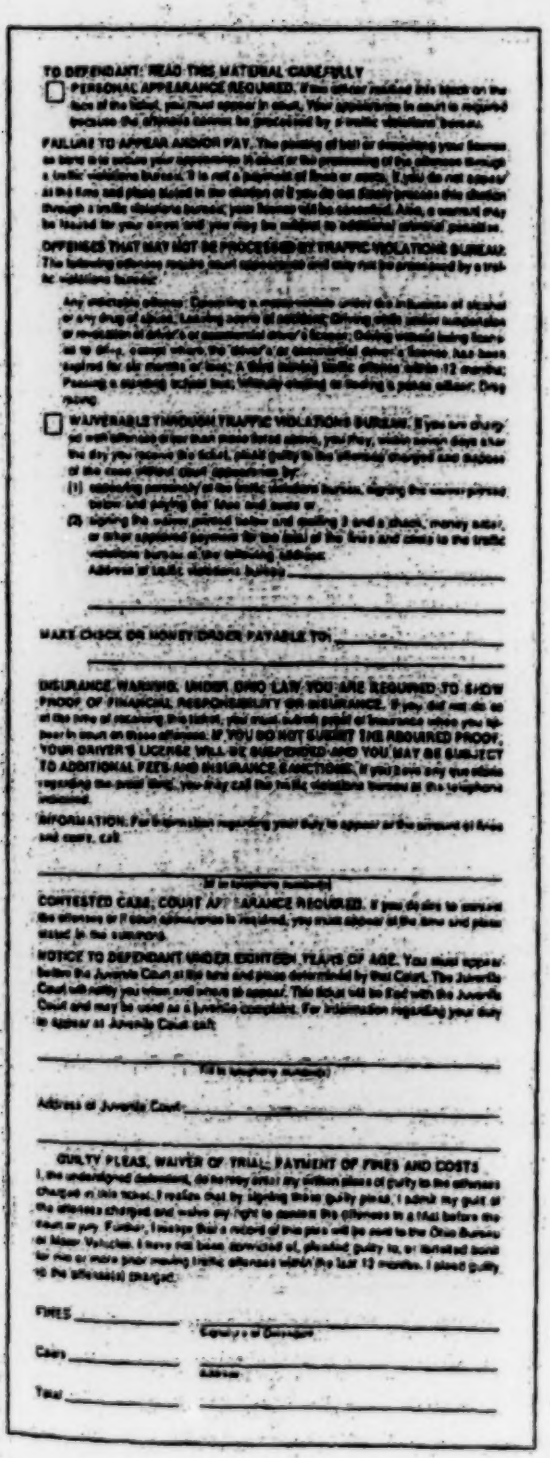
_____ Date of Mayor's Court Transfer / Notice of Appeal

Uniform Traffic Ticket




COURT
COUNTY, OHIO
TICKET NO.
CASE NO.
NAME
STREET
CITY, STATE
ZIP
LICENSE ISSUED NO.
STATE
DOB
RACE
SEX
HEIGHT
WEIGHT
HAIR
EYES
FINANCIAL RESPONSIBILITY PROOF SHOWN
LICENSE NO.
TO DEFENDANT: COMPLAINT
VEHICLE YR.
MAKE
BODY TYPE
COLOR
LIC.
STATE
UPON A PUBLIC HIGHWAY, NAMELY
AT/BETWEEN
IN THE
OF
COUNTY (NO.)
STATE OF OHIO HAS COMMITTED THE FOLLOWING OFFENSE(S)
SPEED:
DRIVER LICENSE:
SAFETY BELT — Failure to use
OTHER OFFENSE
OTHER OFFENSE
DRIVER LICENSE HELD
VEHICLE SEIZED
ARREST CODE
REMARKS
ACCOMPANYING CRIMINAL CHARGE
TOTAL # OFFENSES
TO DEFENDANT: SUMMONS
PERSONAL APPEARANCE REQUIRED
You are summoned and ordered to appear at
Court
Court Code
Unit
Post
Dist.
DEFENDANT'S COPY
PRESENT ADDRESS
SIGNATURE
CO. REG.
PHONE

Uniform Traffic Ticket



TO DEFENDANT: READ THIS MATERIAL CAREFULLY

☐ PERSONAL APPEARANCE REQUIRED. If box above marked this block on the face of the ticket, you must appear in court. Your appearance in court is required because the offense cannot be processed by a traffic violations bureau.

FAILURE TO APPEAR AND/OR PAY. The posting of bail or deposited your license as bond is to secure your appearance in court or the processing of the offense through a traffic violations bureau. It is not a payment of fines or costs. If you do not appear at the time and place stated in the citation or if you do not timely process this citation through a traffic violations bureau, your license will be suspended. Also, a warrant may be issued for your arrest and you may be subject to additional criminal penalties.

OFFENSES THAT MAY NOT BE PROCESSED BY TRAFFIC VIOLATIONS BUREAU. The following offenses require court appearance and may not be processed by a traffic violations bureau:

Any violation of law: Operating a motor vehicle under the influence of alcohol or any drug of abuse; Leaving scene of accident; Driving while under suspension or revocation of driver's or commercial driver's license; Driving without being licensed to drive, except where the driver's or commercial driver's license has been expired for six months or less; A third moving traffic offense within 12 months; Passing a stopped school bus; Willfully eluding or fleeing a police officer; Drag racing.

☐ WAIVERABLE THROUGH TRAFFIC VIOLATIONS BUREAU. If you are charged with offenses other than those listed above, you may, within seven days after the day you receive this ticket, plead guilty to the offense(s) charged and dispose of the case without court appearance by:

(1) executing personally at the traffic violations bureau, signing the waiver printed below and paying the fines and costs or,

(2) signing the waiver printed below and mailing it and a check, money order, or other approved payment for the total of the fines and costs to the traffic violations bureau at the following address:

Address of traffic violations bureau: _____

_____

MAKE CHECK OR MONEY ORDER PAYABLE TO: _____

_____

INSURANCE WARNING: UNDER OHIO LAW, YOU ARE REQUIRED TO SHOW PROOF OF FINANCIAL RESPONSIBILITY OR INSURANCE. If you did not do so at the time of receiving this ticket, you must submit proof of insurance when you appear in court on these offenses. IF YOU DO NOT SUBMIT THE REQUIRED PROOF, YOUR DRIVER'S LICENSE WILL BE SUSPENDED AND YOU MAY BE SUBJECT TO ADDITIONAL FEES AND INSURANCE SANCTIONS. If you have any questions regarding the above, you may call the traffic violations bureau at the telephone indicated.

INFORMATION. For information regarding your duty to appear or the amount of fines and costs, call:

_____

(fill in telephone number(s))

CONTESTED CASE; COURT APPEARANCE REQUIRED. If you do plan to contest the offenses or if court appearance is required, you must appear at the time and place stated in the summons.

NOTICE TO DEFENDANT UNDER EIGHTEEN YEARS OF AGE. You must appear before the Juvenile Court at the time and place determined by that Court. The Juvenile Court will notify you when and where to appear. This ticket will be filed with the Juvenile Court and may be used as a juvenile complaint. For information regarding your duty to appear at Juvenile Court call:

_____

(fill in telephone number(s))

Address of Juvenile Court: _____

_____

GUILTY PLEAS, WAIVER OF TRIAL; PAYMENT OF FINES AND COSTS

I, the undersigned defendant, do hereby enter my written plea of guilty to the offenses charged on this ticket. I realize that by signing this guilty plea, I admit my guilt of the offenses charged and waive my right to contest the offenses in a trial before the court or jury. Further, I realize that a record of this plea will be sent to the Ohio Bureau of Motor Vehicles. I have not been convicted of, pleaded guilty to, or forfeited bond for two or more prior moving traffic offenses within the last 12 months. I plead guilty to the offense(s) charged.

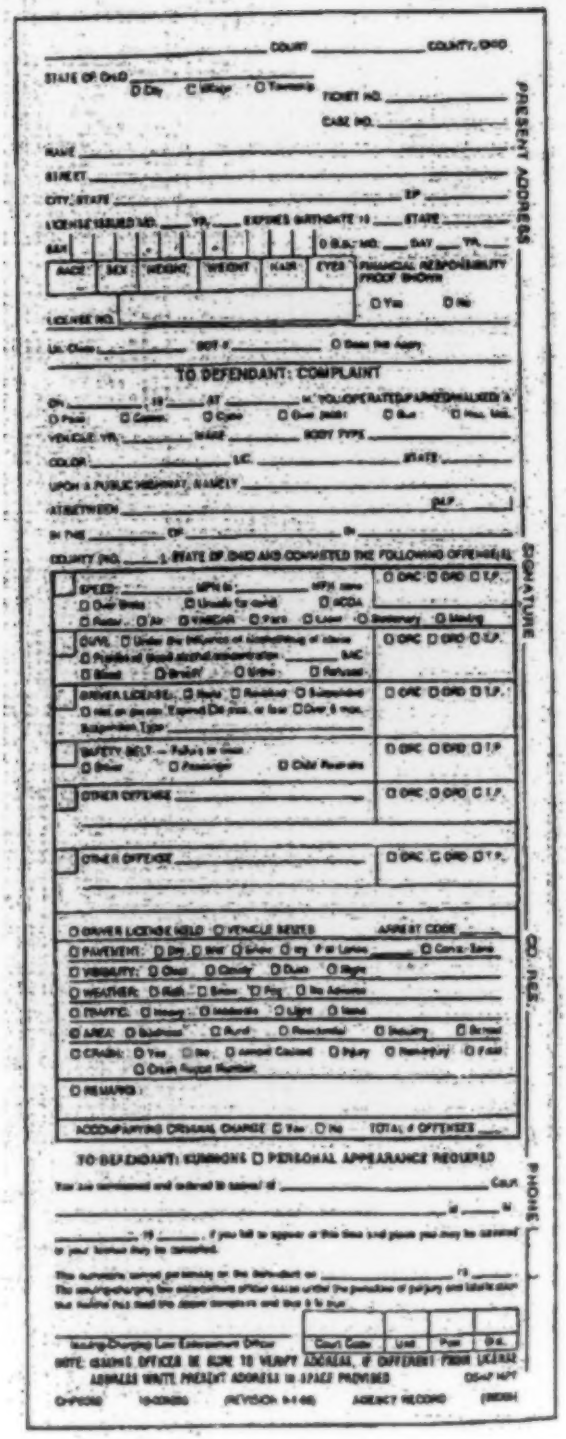
FINES _____ _____

Signature of Defendant

Costs _____ _____

Address

Total _____ _____


COURT COUNTY, OHIO

STATE OF OHIO ☐ City ☐ Village ☐ Township TICKET NO.

CASE NO.

NAME

STREET

CITY, STATE ZIP

LICENSE ISSUED NO. YR. EXPIRES BIRTHDATE YR STATE

DAY YR.

AGE	SEX	WEIGHT	HEIGHT	HAIR	EYES	FINANCIAL RESPONSIBILITY PROOF SHOWN
						☐ Yes ☐ No

LICENSE NO.

Lic. Class DOT # ☐ Does Not Apply

PRESENT ADDRESS

TO DEFENDANT: COMPLAINT

ON 19 AT M. YOU (OPERATED/PARKED/WALKED) A

☐ Pass ☐ Comm. ☐ Cycle ☐ Over (mph) ☐ Bus ☐ Hzd. Veh.

VEHICLE YR. MAKE BODY TYPE

COLOR LIC. STATE

UPON A PUBLIC HIGHWAY, NAMELY

AT/BETWEEN DLP

IN THE OF IN

COUNTY (NO.), STATE OF OHIO AND COMMITTED THE FOLLOWING OFFENSE(S):

SIGNATURE

☐	SPEED: MPH in MPH zone ☐ Over Limits ☐ Unsafe for road ☐ RCDA ☐ Radar ☐ Air ☐ VASCAR ☐ Pace ☐ Laser ☐ Stationary ☐ Moving	☐ ORC ☐ ORD ☐ T.P.
☐	OVI: ☐ Under the influence of alcohol/drug of abuse ☐ Prohibited blood alcohol concentration BAC ☐ Blood ☐ Breath ☐ Urine ☐ Refused	☐ ORC ☐ ORD ☐ T.P.
☐	DRIVER LICENSE: ☐ None ☐ Revoked ☐ Suspended ☐ Not on person ☐ Expired ☐ No cross, or tow ☐ Over 6 mos. Suspension Type:	☐ ORC ☐ ORD ☐ T.P.
☐	SAFETY BELT — Failure to Wear ☐ Driver ☐ Passenger ☐ Child Restraint	☐ ORC ☐ ORD ☐ T.P.
☐	OTHER OFFENSE	☐ ORC ☐ ORD ☐ T.P.
☐	OTHER OFFENSE	☐ ORC ☐ ORD ☐ T.P.

☐ DRIVER LICENSE HELD ☐ VEHICLE SEIZED ARREST CODE

☐ PAVEMENT: ☐ Dry ☐ Wet ☐ Snow ☐ Icy # of Lanes ☐ Construction

☐ ROADWAY: ☐ Clear ☐ Curves ☐ Grade ☐ Hills

☐ WEATHER: ☐ Rain ☐ Snow ☐ Fog ☐ No Adverse

☐ TRAFFIC: ☐ Heavy ☐ Moderate ☐ Light ☐ None

☐ AREA: ☐ Business ☐ Rural ☐ Residential ☐ Industry ☐ School

☐ CRASH: ☐ Yes ☐ No ☐ Animal Caused ☐ Injury ☐ Non-Injury ☐ Fatal ☐ Crash Report Number

CO. RES.

☐ REMARKS:

ACCOMPANYING CRIMINAL CHARGE ☐ Yes ☐ No TOTAL # OFFENSES

TO DEFENDANT: SUMMONS ☐ PERSONAL APPEARANCE REQUIRED

You are summoned and ordered to appear at COURT

at M. on 19 . If you fail to appear at this time and place you may be arrested or your license may be cancelled.

This complaint was personally or by the Defendant on 19 . The undersigned law enforcement officer states under the penalties of perjury and falsification that he/she has read the above complaint and that it is true.

PHONE

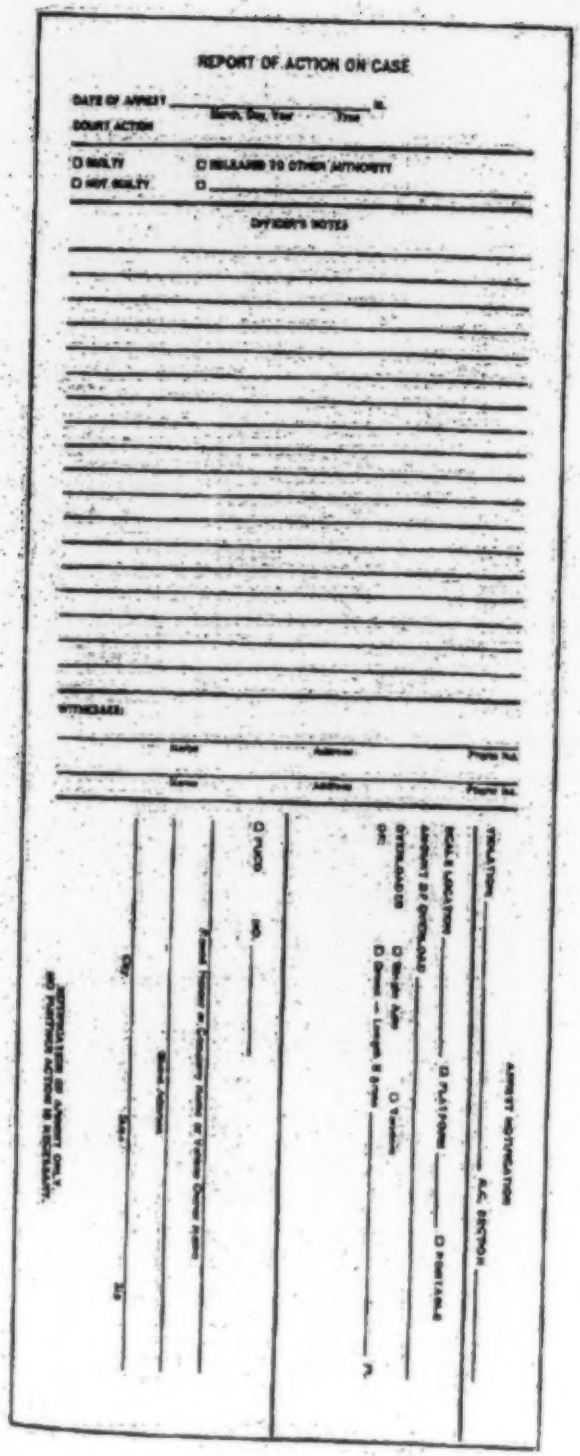
Issuing/Charging Law Enforcement Officer

Court Code	Unit	Post	Dist.

NOTE: ISSUING OFFICER BE SURE TO VERIFY ADDRESS, IF DIFFERENT FROM LICENSE ADDRESS WRITE PRESENT ADDRESS IN SPACE PROVIDED OSHP 1471

OPOS90 10-02/93 (REVISION 9-1-95) AGENCY RECORD (WHITE)

Uniform Traffic Ticket


REPORT OF ACTION ON CASE

DATE OF ARREST _____ M.
Month, Day, Year Time

COURT ACTION

☐ GUILTY ☐ RELEASED TO OTHER AUTHORITY
☐ NOT GUILTY ☐ _____

OFFICER'S NOTES

WITNESSES:

Name Address Phone No.

Name Address Phone No.

VIOLATION _____

SPEED LOCATION _____ ☐ PLATFORM _____ ☐ PHOTOPAK

AMOUNT BY DISTANCE _____

OVERLOADED ☐ Weight Over ☐ Violation

OR ☐ Owner — Lessee $ Over _____ %

ARREST NOTIFICATION

R.C. SECTION _____

☐ PLACE ID. _____

Name of Complaining Witness (Please Print)

Street Number

City State

DETERMINATION OF AMOUNT ONLY AND FURTHER ACTION IS NECESSARY.

Commentary

(1997) The Supreme Court Traffic Rules Review Commission has developed the following Multi-Count Uniform Traffic Ticket. This ticket will significantly

APPENDIX K

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 07-3154

[Filed: February 25, 2008]

CYNTHIA LAMBERT, *Plaintiff-Appellant*,	)
v.	)
GREG HARTMAN, in his official capacity as Clerk of Courts, and HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS, *Defendants-Appellees.*	)

Appeal from the United States District Court for the Southern District of Ohio at Cincinnati. No. 04-00837—Michael H. Watson, District Judge.

Argued: January 30, 2008

Before: GUY, GILMAN, and McKEAGUE, Circuit Judges.

COUNSEL

ARGUED: Marc D. Mezibov, LAW OFFICE OF MARC MEZIBOV, Cincinnati, Ohio, for Appellant. Pamela J. Sears, HAMILTON COUNTY PROSECUTOR'S OFFICE, Cincinnati, Ohio, for Appellees. **ON BRIEF:** Marc D. Mezibov, Christian A. Jenkins, Stacy Ann Hinners, LAW OFFICE OF MARC MEZIBOV, Cincinnati, Ohio, for Appellant. Pamela J. Sears, Michael G. Florez, HAMILTON COUNTY PROSECUTOR'S OFFICE, Cincinnati, Ohio, for Appellees.

OPINION

RONALD LEE GILMAN, Circuit Judge. Cynthia Lambert appeals the district court's dismissal of her complaint against Greg Hartmann in his official capacity as the Hamilton County Clerk of Courts (the "Clerk") and against the Hamilton County Board of County Commissioners (the "County") (collectively the "Defendants"). In September of 2003, Lambert received a traffic citation for speeding. She later discovered that this citation, which contained personal identifying information (including her Social Security number), had been published on the Clerk's public website.

Lambert sued the Defendants pursuant to 42 U.S.C. § 1983, claiming that the publication of the citation violated her constitutional right to privacy under the Fourteenth Amendment to the U.S. Constitution. She further asserted that her identity had been stolen by a third party as a direct result of the Clerk's publication of the citation, and that she had consequently suffered economic damages, damage to her personal credit rating, and damage to her reputation. Lambert also raised state-law claims and sought to certify her complaint as a class action.

The Defendants moved to dismiss Lambert's complaint on the basis that she had failed to state a claim under § 1983. Concluding that Lambert's § 1983 claim must fail because her alleged privacy interest was not of a constitutional dimension, the district court granted the Defendants' motion. The court then dismissed her pendent state-law claims without prejudice. Lambert argues that the court erred in dismissing her complaint and renews her claim that the Defendants violated her constitutional right to privacy. For the reasons set forth below, we **AFFIRM** the judgment of the district court.

I. BACKGROUND

A. Factual background

In September of 2003, Lambert received a traffic citation for speeding in Hamilton County, Ohio. The issuing officer completed an Ohio Uniform Traffic Ticket, a form used throughout Ohio that includes a person's name, signature, home address, birth date, driver's license number, and Social Security number. One copy of the citation was given to Lambert and another was filed with the Clerk's Office. Approximately a year after she received the citation, Lambert was contacted by two retail stores about suspicious purchases that had been made in her name. The individual who made the purchases presented a driver's license that displayed Lambert's full name, home address, birth date, driver's license number, and Social Security number.

During her conversations with the retailers, Lambert was informed that the identity thief might have gained access to her personal information

through the Clerk's website. Lambert then looked on the internet and discovered that the Clerk's publicly accessible site made it possible to search and locate traffic citations that retained all of an individual's identifying information, including his or her Social Security number. When Lambert examined her citation on the website, she realized that, like the fake identification used by the identity thief, the citation contained a driver's license number that was incorrect by one digit. Lambert promptly called the Clerk's Office to complain about the publication of her personal information. The Clerk's Office refused to remove the information, explaining to Lambert that the records were made public for the convenience of the parties and that to remove the records "would require vast amounts of manpower."

Lambert filed suit against the Defendants in December of 2004. By that time, law enforcement officials had apprehended a group of individuals who had gained access to the personal information of numerous people found on the Clerk's website and had used that information to commit identity theft. The police informed Lambert that they had arrested a person who was a part of that ring, a woman who later admitted that she was the thief who stole Lambert's identity from the Clerk's website. That woman was later charged with a conspiracy to commit identity theft, convicted, and sentenced to 139 months' imprisonment for her actions.

B. Procedural background

Lambert's claim under 42 U.S.C. § 1983 alleged that the Clerk's policy and practice of publishing personal information on a public website violated her

Fourteenth Amendment right to privacy, in addition to her Fourth Amendment right to be free from unreasonable searches and seizures, and her Fourteenth Amendment rights to substantive and procedural due process. She contended that, as a result of the Clerk's policy, she had suffered "economic damages, damages to her personal credit rating, and damage to her reputation." Lambert also raised claims under the common law of Ohio for violation of her right to privacy and the tort of publication of private facts. Finally, she requested the certification of a class action under Rule 23 of the Federal Rules of Civil Procedure on behalf of a putative class of "hundreds of thousands" of people whose Social Security numbers had been published on the Clerk's website.

Lambert originally sought declaratory relief, compensatory damages, and an injunction to prevent the publication of the personal information in question. She later sought leave to amend her complaint, removing her demand for compensatory damages and substituting instead a request for "uniform, class-wide relief in the form of a credit monitoring fund or other prophylactic measure to detect or prevent potential identity theft."

The Defendants moved to dismiss Lambert's complaint, arguing, among other things, that she had failed to state a claim upon which relief could be granted. In December of 2006, the district court entered an order granting the Defendants' motion and dismissing all of Lambert's claims. The court reviewed Sixth Circuit precedent addressing the constitutional right to privacy of personal information and concluded that Lambert's claim was without merit because the privacy interest she asserted did "not implicate either

a fundamental right or one implicit in the concept of ordered liberty." Noting that Lambert identified only a "risk of financial harm," the court determined that this injury "bears no equivalence to the potential and actual harm" suffered by the plaintiffs in cases where the Sixth Circuit has recognized a Fourteenth Amendment right to privacy against the disclosure of personal information. The district court therefore agreed with the Defendants that Lambert's claim failed to state a claim under 42 U.S.C. § 1983, concluded that a ruling on her proposed amended complaint was unnecessary, and declined to exercise supplemental jurisdiction over her state-law claims. This timely appeal followed.

II. ANALYSIS

A. Standing

The Defendants assert that because Lambert is no longer seeking compensatory damages and "limits her remedy to credit monitoring relief," she does not have standing to bring her claim. Their contention on this point is somewhat confusing, interchangeably arguing that Lambert's injury is not fairly traceable to the publication of her Social Security number and that "the injury of identity theft in the future is too speculative and conjectural to entitle her to [credit-monitoring] relief." Lambert has failed to address the Defendants' challenge, but we nevertheless conclude that she has standing to bring her claim.

To bring a claim in federal court, a plaintiff "must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or

controversy." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983). This burden can be met by Lambert showing that "(1) [she] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) [her] injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that [her] injury will be redressed by a favorable decision." *See Daubenmire v. City of Columbus*, 507 F.3d 383, 388 (6th Cir. 2007) (internal quotation marks omitted).

Lambert has alleged that her identity was stolen and that her financial security and credit rating suffered as a result. She also claims that because of the nature of identity theft, she has been exposed to the risk that people have accessed her personal information on the internet and will be able to use that information to commit future acts of identity theft against her. Although this latter injury is somewhat "hypothetical" and "conjectural," her actual financial injuries are sufficient to meet the injury-in-fact requirement. *See Club Italia Soccer & Sports Org., Inc. v. Charter Twp. of Shelby, Mich.*, 470 F.3d 286, 294 (6th Cir. 2006) (noting that "[t]his Court has explicitly held that" certain types of economic injuries are sufficient to confer standing).

Indeed, the Defendants do not dispute that Lambert has been injured. They instead attack her standing on the basis that her injuries are not fairly traceable to the Clerk's website. Specifically, they argue that the harm suffered by Lambert was caused by an intervening act—the criminal act of a third party. They therefore claim that Lambert has not met the second prong of the standing test because she is

unable to demonstrate that her injuries are fairly traceable to the Defendants.

The Defendants are correct in pointing out that a third party was undoubtedly the *direct* cause of Lambert's injuries. But because both the traffic citation and the fake identification used to make purchases in Lambert's name contained the identical, incorrect driver's license number, Lambert was able to link the act of identity theft to the personal information that was made available by the Clerk. Moreover, the identity thief (who was indicted and convicted before the district court dismissed Lambert's case) acknowledged that she had taken Lambert's personal information from the Clerk's website. Lambert thus alleged sufficient facts to show that her injuries were fairly traceable to the publication of her personal information by the Clerk. *See Village of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 261 (1977) (explaining that the cause of the plaintiff's asserted injury may be indirect so long as the complaint indicates "that the injury is indeed fairly traceable to the defendant's acts or omissions").

The Defendants also challenge the relief sought by Lambert. They argue that the creditmonitoring fund requested by Lambert would remedy neither her past injury of "publication" nor her potential injury of "future identity theft." The Defendants cite a number of cases that, according to their interpretation, support the contention that Lambert does not have standing. But only one of these cases even addresses standing, and in that case the Sixth Circuit concluded that the plaintiff *had* pled facts sufficient to confer standing. *See Sutton v. St. Jude Medical S.C., Inc.*, 419 F.3d 568, 575 (6th Cir. 2005) (concluding that the plaintiff had

standing to seek medical testing and monitoring allegedly made necessary by the increased risk of future harm created by a heart-valve implant).

Indeed, the Defendants mischaracterize both the injury that Lambert has alleged and the nature of the relief that she seeks. Lambert claims that the past identity theft has damaged her credit rating and that the publication of her personal information has exposed her to a risk of future identity theft. This court's decision in *Sutton* undermines, rather than supports, the Defendants' contention that a monitoring fund would not redress these injuries. We explained in *Sutton* that if the plaintiff could prove that the implanted heart valve had increased the future risk to his health, "medical monitoring [would] undoubtedly help to remedy the situation." *Id.* Likewise, if Lambert were able to prove that she continues to face an increased risk of identity theft, she could likely show that monitoring suspicious activity on her credit report would not only combat that future risk, but would also help to redress the past financial injury that she has suffered. For these reasons, we conclude that Lambert has standing to bring her claims.

B. Immunity claims

The Defendants also raise a number of immunity defenses as an alternative ground for rejecting Lambert's claims. Although Lambert acknowledges that her opponents raised these claims before the district court and on appeal, she declined to address them in either of her briefs or during oral argument. The district court likewise declined to consider any of these arguments, resting its dismissal of Lambert's claims on the merits. Because we agree with the

district court's disposition of this case on the merits, we similarly see no need to address the Defendants' immunity arguments. *See, e.g., Nair v. Oakland County Cmty. Mental Health Auth.*, 443 F.3d 469, 477 (6th Cir. 2006) (explaining that where, as here, a defendant declines to raise Eleventh Amendment immunity as a threshold defense, "federal courts have discretion to address the sovereign-immunity defense and the merits in whichever order they prefer").

C. Lambert's § 1983 claim

1. Standard of review

We review de novo the district court's decision to grant a defendant's motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Dubay v. Wells*, 506 F.3d 422, 427 (6th Cir. 2007). "A motion to dismiss for failure to state a claim is a test of the plaintiff's cause of action as stated in the complaint, not a challenge to the plaintiff's factual allegations." *Golden v. City of Columbus*, 404 F.3d 950, 958-59 (6th Cir. 2005). We must therefore construe the complaint in a light most favorable to Lambert and accept all of her factual allegations as true. *See Dubay*, 506 F.3d at 427. Although the factual allegations in a complaint need not be detailed, they "must do more than create speculation or suspicion of a legally cognizable cause of action; they must show *entitlement* to relief." *League of United Latin Am. Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (emphasis in original) (citing *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1964-65 (2007)).

2. Municipal liability under 42 U.S.C. § 1983

A prima facie case under § 1983 has two elements: "(1) the defendant must be acting under the color of state law, and (2) the offending conduct must deprive the plaintiff of rights secured by federal law." *Bloch v. Ribar*, 156 F.3d 673, 677 (6th Cir. 1998) (citing *Parratt v. Taylor*, 451 U.S. 527, 535 (1981)). To succeed on a § 1983 claim against a local government, the plaintiff must also prove that the injury about which she complains was caused by an unconstitutional government policy or custom. *See Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978) ("[I]t is when execution of a government's policy or custom . . . inflicts the injury that the government as an entity is responsible under § 1983.").

There is no question, of course, that the Defendants acted under color of state law in making Lambert's traffic citation available on the internet. But the Defendants maintain that they cannot be held liable for Lambert's injuries because they were caused by a third party, the identity thief. Although they do not frame it as such, this position is in essence an attack on Lambert's ability to show that the violation she alleges was "committed by a person acting under color of state law." *See Harbin-Bey v. Rutter*, 420 F.3d 571, 575, 577 (6th Cir. 2005) (citing *West v. Atkins*, 487 U.S. 42, 48 (1988)) (holding that a prison's classification of an inmate as a security threat due to his gang affiliation did not constitute an equal protection violation). We have determined, however, that a § 1983 plaintiff can "circumvent the state action requirement if he demonstrated that the state created a special danger" in releasing private information that leads to harm. *Barber v. Overton*, 496 F.3d 449, 453-54 (6th

Cir. 2007) (explaining that a plaintiff could meet the state-action requirement by demonstrating that the state's disclosure put the plaintiff at risk, but declining to reach that question because the prison guards challenging the release of their personal information by prison officials to prisoners had not demonstrated a constitutional violation of their rights to privacy); *see also Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998) (holding that police officers' privacy interest in their personnel files were of a constitutional dimension where the city "created a very real threat to the officers' and their family members' personal security and bodily integrity, and possibly their lives").

Moreover, Lambert sued the Clerk in his official capacity, which is the equivalent of suing the Clerk's employer, the County. *See Alkire v. Irving*, 330 F.3d 802, 810 (6th Cir. 2003) ("While '[p]ersonal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law,' individuals sued in their official capacities stand in the shoes of the entity they represent." (alteration in original) (quoting *Kentucky v. Graham*, 473 U.S. 159, 165 (1985))). The only issue in the present case, then, is whether the Clerk's actions, as alleged in Lambert's complaint, were part of a policy or custom that violated Lambert's constitutional right to privacy.

3. The scope of the constitutional right to privacy

Two types of interests have been identified by the Supreme Court as protected by the right to privacy that is rooted in the substantive due process

protections of the Fourteenth Amendment. One is the interest in "independence in making certain kinds of important decisions." *Whalen v. Roe*, 429 U.S. 589, 599-600 & n.26 (1977) (noting that these decisions have been characterized as dealing with "matters relating to procreation, marriage, contraception, family relationships, and child rearing and education" (quoting *Paul v. Davis*, 424 U.S. 693, 713 (1976))). The other type of privacy interest applicable to individuals is the "interest in avoiding disclosure of personal matters." *Id.* at 599, 603-04 (recognizing that a statute requiring that the state be provided with a copy of certain drug prescriptions implicated the individual's interest in nondisclosure, but upholding the law because the statute contained adequate security measures); *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 465 (1977) (assuming that President Nixon had a legitimate expectation of privacy in his private communications, but upholding a federal law that provided for the review and classification of presidential materials by professional archivists). Lambert's claim implicates the latter interest, which this court has described as "an individual's right to control the nature and extent of information released about that individual" and that "has been coined an informational right to privacy." *Bloch v. Ribar*, 156 F.3d 673, 683 (6th Cir. 1998).

This court, in contrast to some of our sister circuits, "has narrowly construed the holdings of *Whalen* and *Nixon* to extend the right to informational privacy only to interests that implicate a fundamental liberty interest." *Id.* at 684. A plaintiff alleging a violation of her right to informational privacy must therefore demonstrate that "the interest at stake relates to 'those personal rights that can be deemed fundamental

or implicit in the concept of ordered liberty.'" *Id.* (quoting *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981)). Only after a fundamental right is identified should the court proceed to the next step of the analysis— the balancing of the government's interest in disseminating the information against the individual's interest in keeping the information private. *See Kallstrom*, 136 F.3d at 1061 ("This circuit . . . will only balance an individual's interest in nondisclosure . . . against the public's interest in and need for the invasion of privacy where the individual privacy interest is of constitutional dimension.").

Applying these standards, this court has recognized an informational-privacy interest of constitutional dimension in only two instances: (1) where the release of personal information could lead to bodily harm (*Kallstrom*), and (2) where the information released was of a sexual, personal, and humiliating nature (*Bloch*). In *Kallstrom*, the plaintiffs were undercover police officers who had been actively involved in a drug-conspiracy investigation of a violent gang and who had subsequently testified at trial against a number of the gang's members. 136 F.3d at 1059. During the trial, the city—despite having promised to keep the officers' personnel records confidential—released the officers' records to defense counsel. The records contained, among other personal information, the names and addresses of the officers, their immediate family members, and their personal references. *Id.*

This court in *Kallstrom* concluded that the officers' privacy interests were of constitutional dimension because they implicated a fundamental interest "in preserving their lives and the lives of . . . their family

members, as well as preserving their personal security and bodily integrity." *Id.* at 1062. That conclusion was supported by a long line of cases, dating back to the nineteenth century, in which courts have held that individuals have a constitutional right to avoid the kind of *physical* invasions or abuse that "strip[] the very essence of personhood." *Id.* at 1063 (internal quotation marks omitted). The *Kallstrom* court's holding therefore rested on the finding that the city's disclosure had created a risk that the officers' personal information might "fall into the hands of persons likely to seek revenge upon the officers" and had created a "very real threat" to the officers' and their family members' bodily integrity and possibly even their lives. *Id.*

In *Bloch*, this court considered whether the constitutional right to informational privacy was triggered by a press conference in which the sheriff released the "highly personal and extremely humiliating details" of the rape to which Bloch had been subjected, some of which were "so embarrassing she had not even told her husband." *Bloch*, 156 F.3d at 676. The court concluded that Bloch could invoke her Fourteenth Amendment right to privacy because "sexuality and choices about sex, in turn, are interests of an intimate nature which define significant portions of our personhood." *Id.* at 685.

As in *Kallstrom*, this court's holding in *Bloch* was premised on the notion that the disclosure of private sexual information implicated a "fundamental right or one implicit in the concept of ordered liberty"—namely the fundamental right of privacy in one's sexual life. *Id.* at 684, 686. The clear principle emerging from *Bloch* is that the sheriff's publication of the details of

Bloch's rape implicated her right to be free from governmental intrusion into matters touching on sexuality and family life, and that to permit such an intrusion would be to strip away the very essence of her personhood. *See id.* at 685 (citing *Thorne v. City of El Segundo*, 726 F.2d 459, 468 (9th Cir. 1983), for the proposition that an individual's privacy right in her sexual activities "follow[ed] from the cases holding that such basis matters as contraception, abortion, marriage, and family life are protected by the constitution from unwarranted government intrusion").

4. Lambert's claim of a constitutional deprivation

In the face of the Sixth Circuit's restrictive view of informational privacy, Lambert makes two principal arguments to support her assertion that the district court erred in dismissing her complaint. She first claims that the district court's analysis was flawed because "[t]he proper framework should be whether the claimant has a 'reasonable expectation of privacy' in the information he or she wants to keep private, and, if so, whether the government has any legitimate interest in disclosing such information to weigh against the individual interest in disclosure." Second, she contends that the court erred in concluding that the Clerk's publication of her traffic citation on the internet did not implicate a fundamental right.

a. Request for a new standard

Lambert's first argument is a request for us to adopt a new approach to assessing informational privacy claims—one that does not require the court to

first determine whether the privacy interest implicates a fundamental right. The reasonable-expectation-of-privacy standard that Lambert proposes is in many ways similar to the more fluid approach that other circuits have adopted for assessing claims of informational privacy. *See Kallstrom*, 136 F.3d at 1061 n.1 (citing cases in support of the proposition that "[o]ther circuits have interpreted *Whalen* and *Nixon* as creating a broad constitutional right to informational privacy to be balanced against the public's interest and need for the invasion of privacy"); *cf.* Helen L. Gilbert, Comment, *Minors' Constitutional Right to Informational Privacy*, 74 U. Chi. L. Rev. 1375, 1382 (2007) (contrasting the Sixth Circuit's approach to informational privacy with other circuits that do not require the implication of a fundamental liberty interest, and instead "decide if the party alleging an invasion of privacy has a legitimate expectation of privacy in the information in question").

Employing this standard, Lambert argues that she has a reasonable expectation of privacy in her Social Security number, and that the district court therefore erred in failing to balance that interest against the Defendants' interest in publishing unredacted public records on the internet. Lambert is of course correct in pointing out that both Congress and the courts have recognized the privacy interest in one's Social Security number. *See, e.g.*, Privacy Act of 1974, 5 U.S.C. § 552a (providing restrictions on the disclosure of Social Security numbers); *Sherman v. U.S. Dep't of the Army*, 244 F.3d 357, 365 (5th Cir. 2001) (noting, in the context of a Freedom of Information Act request, that "an individual's informational privacy interest in his or her SSN [Social Security number] is substantial"); *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999)

(recognizing that "the indiscriminate public disclosure" of Social Security numbers might implicate the constitutional right to privacy, but concluding that any interest in nondisclosure was outweighed by the government's interest in making bankruptcy documents available to the general public).

The Sixth Circuit, however, has developed and applied a different approach to assessing informational privacy claims. As discussed above, that approach requires that the asserted privacy interest implicate a fundamental right. *See Bloch*, 156 F.3d at 684; *DeSanti*, 653 F.2d at 1090 (holding that the disclosure of juveniles' records to juvenile court personnel did not implicate the plaintiffs' fundamental rights); *Kallstrom*, 136 F.3d at 1061-62 (explaining that the *DeSanti* court "rejected the notion of a general constitutional right of nondisclosure of personal information against which the governmental action must be weighed"). We are bound by those decisions unless this court sitting en banc or the Supreme Court holds otherwise, and Lambert's argument must fail for that reason. *See Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir.1985) (explaining that the decision of a prior panel "remains controlling authority unless an inconsistent decision of the United States Supreme Court requires modification of the decision or this Court sitting en banc overrules the prior decision").

b. Existence of a fundamental right

The district court recognized that this court's precedents require a showing of a privacy interest that implicates a right that is either "fundamental" or "implicit in the concept of ordered liberty." *See Bloch*,

156 F.3d at 684. After reviewing *Kallstrom* and *Bloch*, it concluded that Lambert could not meet this standard because she had "only identified a risk of financial harm." This harm, the court noted, "bears no equivalence to the potential and actual harm suffered by the *Kallstrom* and *Bloch* plaintiffs, respectively." The court therefore refused to balance Lambert's privacy interest against the Defendants' interest in making public records available on the internet. Lambert disputes the district court's conclusion that her harm does not meet the first prong of the test for informational-privacy claims, arguing that the Defendants' invasion of her privacy implicates her fundamental rights.

There are two ways for Lambert to demonstrate that a fundamental right underlies her privacy claim. The first would be to link her interest in nondisclosure to an already established fundamental right. Indeed, this is how the plaintiffs in *Kallstrom* and *Bloch* succeeded. *See Bloch*, 156 F.3d at 685 (acknowledging the well-recognized right to privacy in intimate matters); *Kallstrom*, 136 F.3d at 1062-63 (describing the long history of the right to bodily integrity). Lambert attempts to make this showing by claiming that, like the police officers in *Kallstrom*, her fundamental liberty interest in personal security was compromised by the Clerk's actions.

Alternatively, Lambert could attempt to identify a new fundamental right that was implicated by the public disclosure of her Social Security number. Because the very notion of a fundamental right is rooted in substantive due process, such rights must be based on a protectible interest in life, liberty, or property. *See Does v. Munoz*, 507 F.3d 961, 965 (6th

Cir. 2007) (explaining that some deprivations of life, liberty or property are subject to substantive limitations that provide "heightened protection against government interference with certain fundamental rights" (citations and internal quotation marks omitted)). But this court has recognized that "identifying a new fundamental right subject to the protections of substantive due process is often an uphill battle, as the list of fundamental rights is short." *Id.* (internal quotation marks omitted). Any fundamental right, moreover, must be either "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty." *Id.* (internal quotation marks omitted).

Lambert asserts that the privacy invasion she has alleged is related to (1) her right to personal security, (2) her right to her reputation and good name, and (3) her right to property. She describes the first two as fundamental liberty interests, and the third as a fundamental property interest.

i. Liberty interests

Lambert asserts that the disclosure of her Social Security number implicates two liberty interests. First, she characterizes the theft of her identity as an interference with the right to personal security recognized in *Kallstrom*. She then describes the damage to her credit rating as an injury to her reputation, which she claims this court has recognized as a fundamental liberty interest.

Lambert's attempt to characterize the Clerk's action as an interference with her right to personal security as discussed in *Kallstrom* is unpersuasive.

The *Kallstrom* court unambiguously identified the right involved in that case as one of personal security and bodily integrity, making clear that the fundamental right at issue was a protection against *physical* invasions. Indeed, the court in *Kallstrom* noted that not even all risks of physical harm created by disclosure would trigger the right to privacy under the Fourteenth Amendment. Rather, the officers in that case could invoke constitutional protection only because they were placed "at substantial risk of serious bodily harm, possibly even death, from a perceived likely threat." *Kallstrom*, 136 F.3d at 1064.

Lambert does not argue that the Clerk's actions put her at any risk of physical harm. And although she is undoubtedly correct that identity theft constitutes a serious personal invasion, it simply does not implicate the well-established right to personal security as contemplated by this court in *Kallstrom*. *Cf. Barber v. Overton*, 496 F.3d 449, 456 (6th Cir. 2007) (declining to recognize a privacy interest of a constitutional dimension where prison officials inadvertently released the Social Security numbers of prison guards to inmates, and concluding that "the release of the social security numbers was not sensitive enough nor the threat of retaliation apparent enough to warrant constitutional protection here").

Lambert next claims that the harm to her "creditworthiness" constitutes a reputational injury that implicates a fundamental liberty interest. Despite the obvious reputational interests at play in *Bloch*, Lambert makes no attempt to analogize her harm to that of the injury suffered by the rape victim in that case. She instead relies on this court's decision in *Chilingirian v. Boris*, 882 F.2d 200 (6th Cir. 1989), for

the proposition that "a person's reputation, good name, honor, and integrity are among the liberty interests" protected by the Fourteenth Amendment. *Id.* at 205 (citing *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972)).

Even accepting the questionable assertion that one's credit rating is the type of reputational interest protected by the Due Process Clause of the Fourteenth Amendment, the fact that this court has recognized a liberty interest in one's reputation does not necessarily mean that such an interest is either "fundamental" or "inherent in the concept of ordered liberty." *Cf. Does*, 507 F.3d at 965 (explaining that substantive due process protects only "certain fundamental rights and liberty interests," and noting that the "list of fundamental rights is short" (internal quotation marks omitted)). Moreover, the plaintiff in *Chilingirian* brought a *procedural* due process claim, and this court concluded that an informal "name-clearing hearing" provided sufficient protection of the plaintiff's liberty interest in his reputation. *Chilingirian*, 882 F.2d at 205-06. But the very fact that an informal hearing was sufficient to protect Chilingirian's liberty interest in his reputation negates Lambert's claim that the interest involved was fundamental. *See Does*, 507 F.3d at 964 (noting that certain deprivations of liberty fundamental enough to violate a person's right to substantive due process "are subject to limitations *regardless of the adequacy of the procedures employed*" (emphasis added) (internal quotation marks omitted)).

Lambert has provided no support for the proposition that the harm to her credit implicates a liberty interest that any court has recognized as fundamental, and her argument to the contrary is

simply unpersuasive. Furthermore, she does not even begin to meet the hurdle required for the recognition of a *new* fundamental right. The protection of a person's credit is a concept relating to one's finances and economic well-being, one that by its very nature bears no relationship to the kinds of interests that are "implicit in the concept of ordered liberty." *See Overstreet v. LexingtonFayette Urban County Gov't*, 305 F.3d 566, 575 (6th Cir. 2002) (affirming the denial of a preliminary injunction to a county employee who challenged a policy mandating public disclosure of real estate holdings because "[t]he privacy interest one may have in one's personal finances and real estate holdings is far afield from [the] intimate concerns" recognized as fundamental privacy interests); *cf. Cutshall v. Sundquist*, 193 F.3d 466, 481 (6th Cir. 1999) (rejecting a challenge to a state sex-offender registry on constitutional privacy grounds because the law did "not impose any restrictions on [the plaintiff's] personal rights that are fundamental or implicit in the concept of ordered liberty, such as his procreative or marital rights"). We therefore agree with the district court that Lambert's injuries are more properly described as financial in nature and not truly liberty interests at all.

ii. Property interest

Although this court has never acknowledged a constitutional right to privacy based on the infringement of a property interest, Lambert urges us to recognize such a right in this case. She contends that the Clerk's disclosure of her Social Security number implicated her "fundamental right to property," and that we should proceed to balance her privacy interest against the government's purpose in

publishing records on the internet. The Defendants, in contrast, contend that *Kallstrom* and *Bloch* make clear that this court will recognize a privacy interest of constitutional magnitude only if a fundamental *liberty* interest is implicated.

Even if we were prepared to recognize a constitutional privacy interest based on a property right, Lambert's claim would fail because she has not demonstrated that she had a constitutionally protectible property interest in her personal information. *See Silver v. Franklin Twp. Bd. Of Zoning Appeals*, 966 F.2d 1031, 1036 (6th Cir. 1992) ("To establish a violation of substantive due process, a plaintiff must first establish the existence of a constitutionally-protected property . . . interest."). Lambert never articulates precisely what property deprivation the Defendants' exacted upon her, although we presume that she is referring to the various financial injuries she suffered. The Defendants, however, are correct to point out that this court's precedents are not amenable to the recognition of a constitutional right to privacy based on the infringement of a property interest. *See, e.g.*, *Overstreet*, 305 F.3d at 575 (declining to recognize a privacy interest of constitutional dimension "in one's personal finances and real estate holdings"); *Bloch*, 156 F.3d at 684 (noting that this court has "extend[ed] the right to informational privacy only to interests that implicate a fundamental *liberty* interest" (emphasis added)).

Lambert has undoubtedly shown that, as a policy matter, the Clerk's decision to provide unfettered internet access to people's Social Security numbers was unwise. This much is evidenced by the fact that

the Defendants have subsequently removed the citations in question from the website and changed the local rules to better protect sensitive personal information. But to constitutionalize a harm of the type Lambert has suffered would be to open a Pandora's box of claims under 42 U.S.C. § 1983, a step that we are unwilling to take. *See Paul v. Davis*, 424 U.S. 693, 699 (1976) (rejecting a § 1983 claim against police officials who included the plaintiff's name and mug shot on a flyer warning local merchants about possible shoplifters, and explaining that the plaintiff's legal argument "would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under 'color of law' establishing a violation of the Fourteenth Amendment"). Indeed, absent a showing of an infringement of a right that is "fundamental or implicit in the concept of ordered liberty," this court's precedents bar an action under 42 U.S.C. § 1983 from proceeding any further. Lambert has simply failed to make such a showing.

CONCLUSION

For all of the reasons set forth above, we **AFFIRM** the judgment of the district court.

APPENDIX L

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 07-3154

[Filed: July 14, 2008]

CYNTHIA C. LAMBERT,	)
	)
Plaintiff-Appellant,	)
	)
v.	)
	)
GREG HARTMAN, IN HIS OFFICIAL CAPACITY AS CLERK OF COURTS, ET AL.,	)
	)
Defendants-Appellees.	)

ORDER

BEFORE: GUY, GILMAN, and MCKEAGUE, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/Leonard Green
Leonard Green
Clerk

APPENDIX M

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

No. 1:04cv837

[Filed December 29, 2006]

Cynthia C. Lambert,	)
	)
Plaintiff,	)
	)
v.	)
	)
Greg Hartmann, *et al.*,	)
	)
Defendants.	)
	)

ORDER

This matter is before the Court upon Defendants Greg Hartmann and Hamilton County Board of County Commissioners' Motion to Dismiss. (Doc. 35) Plaintiff has filed a Memorandum in Opposition (Doc. 43) and a Notice of Supplemental Authority (Doc. 53). Defendant filed a Reply (Doc. 49), and the Court permitted Plaintiff to file a Surreply (Doc. 49). Also pending before the Court are Plaintiff's Motion for Leave to File Amended Complaint, Defendants' Memorandum in Opposition (Doc. 37), Plaintiff's Reply

(Doc. 43), Defendants' Reply (Doc. 47), Plaintiff's Motion for Leave to Amend Complaint (Doc. 64), and Defendants' Reply (Doc. 65).

A. FACTS

The following factual background is based upon the allegations in Plaintiff's Complaint, Plaintiff alleges that in September of 2003 she was issued a speeding ticket. (Doc. 1, ¶ 7) The officer issuing the ticket used the Ohio Uniform Traffic Ticket, which included Plaintiff's name, signature, home address, birth date, driver's license number, and social security number. (Id. ¶¶ 7-8) The ticket was filed with the Hamilton County Clerk's Office. (Id. ¶ 9) The ticket was then published on the Clerk's website. (Id. ¶ 10)

Approximately a year after Plaintiff received the speeding ticket, Plaintiff received a call from a Sam's Club store regarding a large purchase made by an individual purporting to be Plaintiff. (Id. ¶ 11) Using a driver's license with Plaintiff's personal identifying information, the individual was able to purchase over $8,000.00 in electronics. (Id.) The next day, Plaintiff received a call from a Home Depot store regarding a credit card account opened in her name. (Id. ¶ 12) An individual using a driver's license with Plaintiff's personal information charged approximately $12,000.00 in purchases to this account. (Id.) Plaintiff learned that the driver's license number used on the identification produced by the individual purporting to be her was wrong by one digit. (Id. ¶ 13) Plaintiff found the speeding ticket on the Clerk's website and noted that the officer had recorded her driver's license number off by one digit. (Id.) Subsequently, Plaintiff learned that the Blue Ash Police had arrested a

woman who the Police believed had stolen Plaintiff's identity. (Id. at ¶ 16)

Plaintiff alleges that as a direct and proximate result of the publication of her social security number and other personal identifying information on the Clerk's website, Plaintiff has suffered economic damages, damages to her personal credit rating, and damage to her reputation. (Id. at ¶ 19)

Plaintiff brings this action on behalf of herself and others similarly situated. (Id. ¶ 1) Plaintiff brings claims for violation of her right to privacy under the United States Constitution; violation of her Fourteenth Amendment right to personal security; violation of her right to procedural and substantive due process under the Fourteenth Amendment; violation of her legitimate expectation of privacy to be free from unreasonable search and seizure under the Fourth Amendment; violation of her right to privacy under Ohio common law; and publication of private facts under Ohio common law. (Id. ¶¶ 30-41) In her first Motion for Leave to File Amended Complaint, Plaintiff seeks to amend her Complaint by properly naming the Hamilton County Commissioners; cite to more specific relief in the form of a court-supervised credit monitoring fund or other prophylactic relief; delete unnecessary facts; and add two additional allegations.[1] (Doc. 29) Plaintiff's Second Motion for Leave to Amend Complaint seeks to add two claims. (Doc. 64) The first

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[1] These allegations are that Defendants have known since 2002 that individuals have been using information gathered from traffic tickets posted on the Clerk's website in order to commit identity theft; and personal information can be shared or sold to others who may hold it for years before using it to commit crimes.

claim is one for interference with rights common to the public, including the right to privacy, the right to be free from unlawful identity theft, the right to personal security and integrity, and the rights secured by Ohio Revised Code Chapter 1347. The second claim is one for a violation of Ohio's Privacy Act, Ohio Rev. Code § 1347.01, *et seq.*

B. ANALYSIS

1. Motion to Dismiss Standard

Defendants' motion is made pursuant to Federal Rules of Civil Procedure 12(b)(1) and (6).

The Sixth Circuit has distinguished between facial and factual attacks among motions to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1). *Pritchard v. Dent Wizard Intern. Corp.*, 210 F.R.D. 591, 592 (S.D.Ohio 2002). A facial attack on the subject matter jurisdiction alleged by the complaint merely questions the sufficiency of the pleading. *Ohio Nat. Life Ins. Co. v. U.S.*, 922 F.2d 320, 325 (6th Cir. 1990). In reviewing such a facial attack, a trial court takes the allegations in the complaint as true, which is a similar safeguard employed under 12(b)(6) motions to dismiss. *Id.* Here, Defendants' Motion attacks the sufficiency of the pleadings, and is therefore a facial attack.

A motion to dismiss under Rule 12(b)(6) requires this Court to construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief. *Meador*

v. Cabinet for Human Resources, 902 F.2d 474, 475 (6th Cir. 1990), *cert. denied,* 498 U.S. 867 (1990). "However, while liberal, this standard of review does require more than the bare assertion of legal conclusions." *Columbia Natural Res., Inc. v. Tatum,* 58 F.3d 1101, 1109 (6th Cir. 1995); *see also Chapman v. City of Detroit,* 808 F.2d 459, 465 (6th Cir. 1986) ("It is not enough for a complaint ... to contain mere conclusory allegations of unconstitutional conduct by persons acting under color of state law. Some factual basis for such claims must be set forth in the pleadings.").

2. Constitutional Right to Privacy

Defendants argue that Plaintiff has failed to state a claim under 42 U.S.C. § 1983 because she has no constitutional right to privacy in her social security number.

Section 1983 imposes civil liability on a person acting under color of state law who deprives another of the "rights, privileges, or immunities secured by the Constitution and laws." 42 U.S.C. § 1983. Therefore, a plaintiff must allege two elements to establish a *prima facie* case under section 1983: (1) that the action occurred "under color of law"; and (2) that the action was a deprivation of a constitutional right or a federal statutory right. *Parratt v. Taylor,* 451 U.S. 527, 535 (1981) *overruled on other grounds by Daniels v. Williams,* 474 U.S. 327 (1986).

Plaintiff principally relies upon two cases for the proposition that an individual has a constitutional right to privacy in one's social security number: *Smith v. City of Dayton,* 68 F.Supp.2d 911 (S.D. Ohio 1999)

and *State ex. rel. Beacon Journal Publishing Co. v. City of Akron*, 640 N.E.2d 164 (Ohio 1994).

In *Smith*, at issue was the release of information from a police officer's personnel file, including his home address and the results of his psychological and mental examinations. 68 F.Supp.2d at 915. This Court recognized that the Ohio Supreme Court in *Beacon Journal* had recognized a federal constitutional right to privacy in one's Social Security number. *Id.* at 917. However, this Court called this holding into doubt based on the Sixth Circuit's decision in *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998). Ultimately, this Court found that under *Kallstrom*, the plaintiff did have a right to privacy in his address. However, the Court finds that the finding of a constitutional right to privacy is not automatic, and cannot be applied to broad categories of information.[2] Instead, this Court must analyze the asserted right under the Supreme Court's decisions in *Whalen v. Roe*, 429 U.S. 589 (1977) and *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), and the Sixth Circuit's interpretation of these cases, including *Kallstrom*.

---

[2] A review of other decisions by the district courts within the Sixth Circuit reveals that district courts have declined to find a constitutional right to privacy in personal information. *Lawson v. Baxter*, 2006 WL 3004069, *2, n. 1 (W.D. Mich. October 20, 2006) (slip op.) (expressing doubt that any privacy right under the Fourteenth Amendment extends to release of plaintiffs social security number or other private information); *Pitts v. Perkins Local School Board*, 2006 WL 1050675, *2 (N.D. Ohio April 19, 2006) (unpublished) (no Fourth Amendment right to privacy in address, phone number, and social security number).

In *Whalen,* the Supreme Court considered whether a New York statute violated a patient's constitutional right to privacy. 429 U.S. at 591. The statute required that the names and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and an unlawful market. *Id.* The Court recognized two different kinds of privacy interests: (1) the "interest in independence in making certain kinds of important decisions," and (2) the interest "in avoiding disclosure of personal matters." *Id.* at 599-600.The Court found there was no constitutional violation because the New York law evidenced a proper concern for the protection of the individual's interest in privacy. *Id.* at 605-606.[3]

In *Nixon,* the former president brought a constitutional challenge to the Presidential Recordings and Materials Preservation Act, which directed the Administrator of General Services to take custody of presidential tapes and other materials that accumulated during Nixon's presidency, separate the private from the public, and retain the public. 433 U.S. at 425.Nixon argued that the statute violated his right of privacy under the Fourth and Fifth Amendments.

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[3] The Court recognized the potential threat to privacy in the collection of vast amounts of data, but because the statute, and its implementing administrative procedures "evidence[d] a proper concern with, and protection of, the individual's interest in privacy," the Court stated that it "need not, and do not, decide any question which might be presented by the unwarranted disclosure of accumulated private data--whether intentional or unintentional--or by a system that did not contain comparable security systems." *Id.* at 605-606.Justice Stewart wrote separately and noted the Court's opinion did not support the proposition that broad dissemination of the information collected by the state would violate the Constitution. *See id.* at 608-609.

Id. at 455. The Court found that Nixon did have a legitimate expectation of privacy in private communications between himself and his family, his physician, or his minister. *Id.* at 457 (recognizing that "public officials, including the President, are not wholly without constitutionally protected privacy rights in matters of personal life unrelated to any acts done by them in their public capacity."). However, the Court held that the statute did not violate Nixon's right of privacy. *Id.* at 465.The Court explained that Nixon's expectation of privacy was outweighed by the limited intrusion of the screening process, by Nixon's status as a public figure, by his lack of any expectation of privacy in the overwhelming majority of the materials, by the important public interest in the preservation of the materials, and by the virtual impossibility of segregating the small quantity of private materials without comprehensive screening. *Id.*

The Sixth Circuit has narrowly construed *Whalen* and *Nixon*, holding that the right to privacy is triggered only when the interest at stake concerns "those personal rights that can be deemed 'fundamental' or 'implicit' in the concept of ordered liberty." *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981) ("Absent a clear indication from the Supreme Court we will not construe isolated statements in *Whalen* and *Nixon* more broadly than their context allows to recognize a general constitutional right to have disclosure of private information measured against the need for disclosure."); *see also Kallstrom v. City of Columbus*, 136 F.3d 1055, 1061 (6th Cir.1998) ("This circuit has read *Whalen* and *Nixon* narrowly, and will only balance an individual's interest in nondisclosure of informational privacy against the

public's interest in and need for the invasion of privacy where the individual privacy interest is of constitutional dimension.") Therefore, the Sixth Circuit has concluded that the Constitution does not encompass a "general right to nondisclosure of private information." *DeSanti,* 653 F.2d at 1090.[4]

Therefore, not all disclosures of private information will trigger constitutional protection. The Sixth Circuit requires the following two-step process for analyzing informational right-to-privacy claims: (1) the interest at stake must implicate either a fundamental right or one implicit in the concept of ordered liberty; and (2) the government's interest in disseminating the information must be balanced against the individual's interest in keeping the information private. *Bloch v.*

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[4] In *J.P. v. DeSanti,* juveniles who had been convicted of a crime challenged the release of personal information to governmental, social, and religious agencies. *Id.* at 1082. The Sixth Circuit rejected their claim, observing that "the fact that the Constitution protects several specific aspects of individual privacy does not mean that it protects all aspects of individual privacy. Nor is there any indication in any [Supreme Court privacy decisions] of a constitutional right to nondisclosure of juvenile court records." *Id.* at 1088. However, the court explained that their opinion should not be read as holding that there is no constitutional right to nondisclosure of private information. *Id.* at 1090. Instead, the court explained that "[o]ur opinion simply holds that not all rights of privacy or interests in nondisclosure of private information are of constitutional dimension, so as to require balancing government action against individual privacy." *Id.* at 1091. Since *DeSanti,* the Sixth Circuit has found that the dissemination of private information may implicate a constitutional right to privacy. *See, e.g., Bloch v. Ribar,* 156 F.3d 673, 686 (6th Cir. 1998); *Kallstrom v. City of Columbus,* 136 F.3d 1055, 1062 (6th Cir. 1998), *discussed infra.*

Ribar, 156 F.3d 673, 684 (6th Cir. 1998), *citing DeSanti*, 653 F.2d at 1090-91.

In *Kallstrom v. City of Columbus*, the Sixth Circuit found that under the first step of the above analysis, the plaintiffs had a privacy interest in personal information of a constitutional dimension. 136 F.3d at 1062. The facts of *Kallstrom* are that the City of Columbus disclosed personal information contained in police officer personnel files to defense counsel during a criminal trial in which the officers testified against the defendants. *Id.* at 1058. The court noted that "[i]ndividuals have 'a clearly established right under the substantive component of the Due Process Clause to personal security and to bodily integrity,' and this right is fundamental where 'the magnitude of the liberty deprivation that [the] abuse inflicts upon the victim ... strips the very essence of personhood.'" 136 F.3d at 1062-63, *quoting Doe v. Claiborne County*, 103 F.3d 495, 507 (6th Cir. 1996). The Court explained that "it goes without saying that an individual's 'interest in preserving her life is one of constitutional dimension.'" *Id.*, *quoting Nishiyama v. Dickson County*, 814 F.2d 277, 280 (6th Cir. 1987) (en banc). The court concluded that the disclosure of the officers' addresses, phone numbers, and driver's licenses, as well as the personal information of their family members rose to a constitutional dimension because of the threat to the personal security and bodily integrity of the officers and their family members. *Id.* at 1063. The court therefore proceeded to the second step, and balanced the officers' interests against those of the city. *Id.* The court noted that Ohio's Public Records Act required the state to make available all public records to any person, and for purposes of the case before it, assumed that the interest in public access to these records rose

to a compelling state interest. *Id.* at 1064-65. Nevertheless, the court found that the release of the officers' information was not narrowly tailored to serve these interests. *Id.* at 1065.The court explained: "[w]hile there may be situations in which the release of the this type of personal information might further the public's understanding of the workings of its law enforcement agencies, the facts as presented here do not support such a conclusion." *Id.*

In *Bloch v. Ribar,* the Sixth Circuit again found that the plaintiffs had an interest at stake which implicated either a fundamental right or one implicit in the concept of ordered liberty. 156 F.3d at 685. In *Bloch,* a rape victim and her husband claimed that the sheriff violated their constitutional rights by holding a press conference to release the confidential and highly personal details of the rape by an unknown assailant. *Id.* at 676.The court noted that "[t]he fact that the crime of rape occurred in this case implicates both a private and a public interest, but the details of the rape primarily implicate a private interest until such time as the public interest in prosecution predominates." *Id.* at 685-86. Therefore, the court concluded that "a rape victim has a fundamental right of privacy in preventing government officials from gratuitously and unnecessarily releasing the intimate details of the rape where no penalogical purpose is being served." *Id.* at 686. Moving to the second step of the analysis, the court explained that it appeared that there was no justification for disseminating the details of the rape at the time of the press conference. *Id.* Therefore, the court found that the plaintiffs had raised a cognizable privacy claim under section 1983. *Id.*

Unlike *Kallstrom* and *Bloch*, the Court determines that Plaintiff's alleged privacy interest in her name, signature, home address, birth date, driver's license number, and social security number do not implicate either a fundamental right or one implicit in the concept of ordered liberty. Plaintiff has only identified a risk of financial harm. While the Court is not unmindful of the problems which may result from the release of personal information, it nonetheless is beyond dispute that plaintiff's injury from the release of information in this case bears no equivalence to the potential and actual harm suffered by the *Kallstrom* and *Bloch* plaintiffs, respectively, which harm the Sixth Circuit has found to be protected by the Fourteenth Amendment. Therefore, the Court concludes that based upon the allegations in the Complaint, Plaintiff is not entitled to relief under section 1983. The Court finds that nothing within Plaintiff's proposed amendments to the Complaint would alter this conclusion.

4. State Law Claims

Having found that Plaintiff's constitutional claims are to be dismissed, the Court now turns to Plaintiff's claims under Ohio law for violation of her right to privacy and publication of private facts, as well as Plaintiff's proposed claims for interference with rights common to the public, including the right to privacy, the right to be free from unlawful identity theft, the right to personal security and integrity, and the rights secured by Ohio Revised Code Chapter 1347; and violation of Ohio's Privacy Act, Ohio Rev. Code § 1347.01, *et seq.*

The Court has supplemental jurisdiction over these state law claims because these claims form part of the same controversy as Plaintiff's Section 1983 claim. *See* 28 U.S.C. § 1367(a). However, this Court may decline to exercise supplemental jurisdiction if:

> (1) the claim raises a novel or complex issue of State law,
>
> (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
>
> (3) the district court has dismissed all claims over which it has original jurisdiction, or
>
> (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

28 U.S.C. § 1367(c). When a plaintiff's federal claims have been dismissed on the merits, the question of whether to retain jurisdiction over the state law claims rests within the Court's discretion. *Blakely v. United States,* 276 F.3d 853, 860 (6th Cir. 2002). However, the dismissal of the claim over which the federal court had original jurisdiction creates a presumption in favor of dismissing without prejudice any state-law claims that accompanied it to federal court. *Id.* at 863. In addition, "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers of Am. v. Gibbs,* 383 U.S. 715, 726 (1966). The Court finds that the issues presented are more appropriate for resolution by the state court system,

and therefore the Court declines to exercise its supplemental jurisdiction.

C. CONCLUSION

Defendants Greg Hartmann and Hamilton County Board of County Commissioners' Motion to Dismiss (Doc. 35) is hereby **GRANTED**. It is further **ORDERED** that Plaintiff's constitutional claims under section 1983 are **DISMISSED WITH PREJUDICE**; and the remaining claims based on state law are **DISMISSED WITHOUT PREJUDICE**.

IT IS SO ORDERED.

/s/ Michael H. Watson
Michael H. Watson, Judge
United States District Court

114 (4)

No. 08-500

Supreme Court, U.S.
FILED
DEC 2 - 2008
OFFICE OF THE CLERK

IN THE

United States Supreme Court

CYNTHIA LAMBERT,

Petitioner,

v.

GREG HARTMANN, Clerk of Courts for Hamilton County, and HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

There is a curious tension between the cover of Respondents' brief and its body. They call it a "Brief in Opposition," but they do not actually "oppose" any argument in the Petition. They concede the circuit split. They tacitly admit the importance of the conflict. And they offer no defense against the argument that the Sixth Circuit's rule flouts this Court's precedents.

Instead of opposing the Petition's arguments, Respondents offer a litany of dodges. First, they insist that the issue that has split the circuits is not presented here. But the Sixth Circuit acknowledged the split and disposed of the case on the basis of that issue alone. They also offer alternative grounds for affirmance—grounds that the courts below did not reach, and that are meritless. Finally, they argue that Ms. Lambert lacks standing. But they base the argument on a misunderstanding of the claim and the law.

A more apt label is: "Brief in Obfuscation."

I. RESPONDENTS DO NOT DISPUTE A SINGLE POINT IN THE PETITION.

The Petition made three arguments in support of certiorari. Respondents do not dispute any of them.

Point I is that the Sixth Circuit has adopted a rule on the scope of the right of informational privacy that conflicts with the rule adopted by eight other circuits. Eight circuits recognize that a plaintiff can claim a constitutional right of

privacy in private information without showing that a fundamental liberty interest is at stake. The Sixth Circuit stands alone in imposing this threshold requirement. *See* Pet. 9–17.

Respondents concede the circuits apply "distinct approaches." Opp. 6. Further, Respondents concede that "[t]he Sixth Circuit acknowledged in its opinion that other circuit courts of appeal have used" a different balancing "approach." *Id.* And they do not deny that the Sixth Circuit's position is by now entrenched, and the conflict is intractable.

Point II is that the circuit split is an issue of national importance, particularly in light of the national scourge of identity theft. Petitioners do not dispute the pervasiveness of the problem (8.3 million victims per year) or its immense cost ($15.6 billion per year). *See* Pet. 17. They do not dispute that consumers are especially vulnerable to releases of information by governments, because governments, by force of law, keep treasure troves of private identity information. Nor do they dispute that without a constitutional right of action, consumers are powerless to hold government officials accountable for purposely releasing information, knowing that they are exposing citizens to potential financial ruin.

Point III is that the Sixth Circuit's position on the issue of informational privacy conflicts with this Court's prior rulings in *Whalen* and *Nixon*. *See* Pet. 20–24. Respondents make no effort to reconcile the Sixth Circuit's rule with these decisions.

In short, Respondents either explicitly concede or completely ignore virtually every word of the Petition.

II. RESPONDENTS' EFFORTS TO NARROW THE QUESTION PRESENTED ARE UNAVAILING.

Since Respondents cannot refute the certworthiness of the question presented, they devote most of their energy to changing the subject in two ways: (A) by narrowing the complaint to challenge only a specific mode of dissemination; and (B) by insisting the claim presented would fail even under the majority rule. Both efforts are unavailing.

A. The Complaint Challenges the Disclosure of Private Information, Not Just the Mode of Disclosure.

Respondents mischaracterize the complaint when they assert: "It is not specifically identifying the criminal defendant in the public record that is the alleged wrong. Instead, it is the publication of that information on the county's website that is the alleged wrong in this case." Opp. 12.

This argument conflates Ms. Lambert's factual assertion as to what *caused* her injury in this case with her *constitutional theory* as to why that injury is actionable. The constitutional claim is premised on the view that *any* publication of private information is impermissible. Ms. Lambert complained that "hundreds of thousands [of] persons . . . have had their social secu-

rity numbers published by the Clerk of courts." CA App. 17. And her Prayer for Relief seeks to enjoin Respondents "from further indiscriminately publishing personally identifiable information and social security numbers of citizens by means of its official website . . . *or by any other means*." CA App. 21 (emphasis added).

It so happens that Ms. Lambert was injured by an especially egregious, dangerous, and pervasive instance of publication—Mr. Hartmann's "policy and practice of systematically publishing personal and private information on [the] website, which offers unrestricted access to said information." CA App. 12. But just because the complaint explains how Mr. Hartmann caused Ms. Lambert's injury does not mean that she was trying to narrow her constitutional claim to depend on some "distinction between records made public in paper form and records made public in electronic form." Opp. 14.

Certainly, neither the Court of Appeals nor the District Court read the complaint in such a crimped and unnatural manner. The Court of Appeals believed that "[Ms.] Lambert's claim implicates the . . . 'individual's right to control the nature and extent of information released about the individual,' [which] 'has been coined an informational right to privacy.'" App. 13–14 (citation omitted); *see also* App. 31 (similar formulation in District Court). Neither so much as hinted that it was addressing the narrower question whether there is a constitutional right to preclude the government from taking informa-

tion that is otherwise public and posting it on a website.

Thus, Respondents' efforts to defeat this narrowed theory are wasted. In any event, the two cases Respondents invoke are inapposite. This case has nothing to do with the principles at issue in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), which revolved around the public's right to attend trial proceedings. Nothing in *Richmond Newspapers* suggests that a court is constitutionally obliged to publicize litigants' Social Security numbers. Similarly, *Cox Broadcasting v. Cohn*, 420 U.S. 469 (1975), merely stands for the proposition that a privately owned *newspaper* cannot be held liable for reprinting information that the government has already put in the public domain. It does not stand for the proposition that a governmental entity can avoid liability for an egregious violation of privacy by pointing out that the government itself also committed a more limited violation.

B. Resolving the Threshold Question in Ms. Lambert's Favor Will Lead to a Different Outcome.

Respondents next insist that "[w]hether the Sixth Circuit or other Circuit Courts of Appeal properly interpret" *Whalen* and *Nixon* "makes no real difference to the resolution of this case." Opp. 19. As they see it, even under the majority rule, "[Ms.] Lambert could not show a reasonable objective expectation of privacy that would justify keeping her personal identifiers from the

public record." Opp. 15. In other words, they claim they have an alternative ground for dismissal, even if Ms. Lambert prevails on the question presented.

It is not clear whether Respondents are speculating about what might happen at future stages of the litigation or suggesting that they will offer this Court an alternative ground for affirmance, even though neither of the courts below addressed the fact-intensive alternative ground. Neither version of the argument is a basis for denying certiorari on the threshold question that has split the lower courts and that transcends this case and transcends even the context of personal identifiers.

More importantly, whether they raise the issue in this Court or on remand, Respondents are plainly wrong in contending that Ms. Lambert had no expectation of privacy in her Social Security number. Both federal law and Ohio law give rise to an expectation of privacy. The federal government takes great pains to keep that information private. *See, e.g.*, Privacy Act of 1974, 5 U.S.C. § 552a (providing restrictions on the disclosure of Social Security numbers by agencies of the federal government); Intelligence Reform and Terrorism Prevention Act of 2004, 42 U.S.C. § 405(c)(2)(C)(vi)(II) (prohibiting states from listing citizens' Social Security numbers on drivers' licenses and state-issued identification cards). Based upon these federal protections, courts have found that individuals have a reasonable expectation of privacy in their Social Se-

curity number to the extent it is collected and maintained by a government entity. *See Sherman v. U.S. Dep't of the Army*, 244 F.3d 357, 365 (5th Cir. 2001) ("[A]n individual's informational privacy interest in his or her SSN is substantial."); *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999); *State ex rel. Beacon Journal Pub'g Co. v. Akron*, 640 N.E.2d 164, 169 (Ohio 1994). We have not found, and Respondents have not cited, any on-point authority taking the contrary position.

III. MS. LAMBERT HAS STANDING BECAUSE SHE SUFFERED AN INJURY AND HAS NOT BEEN MADE WHOLE.

Respondents' jurisdictional objections are hard to fathom. At points, they argue that Ms. Lambert lacks standing, which "must exist when the Complaint is filed." Opp. 7. At other points, their objection sounds more in mootness—that "there is *no longer* a case and controversy between Petitioner Lambert and the Respondents," based largely on events that are not in the record at this point. Opp. 11 (emphasis added). As the Court of Appeals held, both versions of the objection are meritless.

To establish standing sufficient to survive a motion to dismiss, Ms. Lambert need only have alleged: (1) that she suffered an injury in fact as a result of Mr. Hartmann's conduct; (2) that her injury is fairly traceable to the challenged action; and (3) it is likely that her injury will be redressed by the relief she requests. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61

(1997). The complaint plainly establishes each of these elements.

The operative complaint alleges that Ms. Lambert was injured in multiple ways: (1) "nearly $20,000 worth of unauthorized charges appeared on various accounts in [her] name"; (2) "[a]s a result, Ms. Lambert's credit rating has fallen"; (3) "[s]he has invested substantial amounts of time and energy to ensure that she will not be held personally liable for any unauthorized charges"; (4) "Ms. Lambert has invested a great deal of time and has suffered emotional distress and anxiety arising from her attempts to clear her name and her credit rating"; (5) "Ms. Lambert has suffered . . . damage to her reputation"; and (6) because "she has no way of knowing who else might have access to her personal and private information that was posted on the Court's website[,] . . . Ms. Lambert could face another round of fraudulent activity and unauthorized charges." CA App. 17.

Respondents do not argue that this litany of harm is not injury-in-fact. Instead, they assert that a "subsequent proposed amended Complaint makes clear that Sam's Club and the Home Depot made Petitioner Lambert whole financially." Opp. 8. As an initial matter, that proposed complaint is not the operative complaint, which is all that is relevant in a standing controversy. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 51 (1991). But in any event, the proposed complaint says no such thing. *See* CA App. 111–22. The most that can be gleaned from the new com-

plaint is that Ms. Lambert is prepared to abandon the operative complaint's demand for "an award of compensatory damages" for all these harms, CA App. 21, and instead demands only prospective relief: (1) an order enjoining Respondents from releasing private information publicly; and (2) "an award of uniform, class-wide relief in the form of a credit monitoring fund or other prophylactic measure to detect or prevent potential identity theft . . . to which Plaintiff and putative class members have been unjustifiably and unreasonably exposed." CA App. 120.

The difference in proposed relief—even if it could be considered on a motion to dismiss a different operative complaint—is obviously not a concession that the mere reversal of charges "made Petitioner Lambert financially whole." Opp. 8. Reversing the charges does not, for example, address Ms. Lambert's credit-rating or reputational harm. And it certainly does not take care of the money she has had to expend to ensure that the "ring of identity thieves" that already has her private information will not strike again. The change in focus in the proposed complaint simply reflects a strategic decision to focus on obtaining prospective relief that will shield Ms. Lambert—and the class as a whole—from future abuses and future repercussions of Respondents' past wrongdoing.

Which brings us to the third prong of the standing inquiry—that the injury asserted must be redressable by the relief requested. Here, Re-

spondents' argument seems to be that the prospect that Ms. Lambert will suffer future instances of identity theft is "purely conjectural." Opp. 10. But Respondents can make that argument only by distorting the risk identified in the complaint. The point in the complaint is not, as Respondents suggest, that "maybe someone else in the future might steal Lambert's personal identifiers from the Respondent Hartmann's website" and "[m]aybe that thief would use the information to again induce Home Depot and Sam's Club to extend credit." Opp. 9.

The risk is as follows: Because of Mr. Hartmann's improper conduct, Ms. Lambert's personal identifying information has already been released. It has already been plundered by "a ring of identity thieves." CA App. 16. Only one member of that crime syndicate has been apprehended. It is almost inevitable that some of the victims of that massive publication of information are still in the sites of those thieves or others who might already have preserved the information or who could access it through website archives. The possibility is concrete enough that a lucrative security industry has emerged to guard against it. Ms. Lambert has expended resources hiring such a firm to protect against the risk. *Id.* She is simply requesting relief that would require the defendants to assume the responsibility for continued monitoring to shield against the risk they created, rather than forcing each of the affected individuals, on peril of future identity thefts, to absorb the expense and energy of making individual monitoring ar-

rangements. *See Sutton v. St. Jude Med. S.C., Inc.*, 419 F.3d 568, 575 (6th Cir. 2005) (holding that medical testing and monitoring was a proper prospective remedy for the increased risk of future harm caused by a heart-valve implant).

For similar reasons, various changes in the law and in county practices do not moot the relief Ms. Lambert has requested. It is nice to know Hamilton County has learned its lesson and now has a rule that "addresse[s] remote public access to sensitive information, including SSN's on the website." Opp. 9. But this rule does not address the continuing risk from Mr. Hartmann's past malfeasance.

IV. RESPONDENTS' DEFENSE OF ELEVENTH AMENDMENT IMMUNITY IS NOT A BASIS FOR DENYING THE PETITION.

Respondents' final argument is yet another alternative ground for affirmance: They argue that they are entitled to Eleventh Amendment immunity. Respondents do not suggest that their immunity defense presents a novel issue of law or is otherwise independently cert-worthy. Besides, both the District Court and the Court of Appeals saw "no need to address the Defendants' immunity argument," App. 10, and Respondents offer no argument for why this Court should depart from its usual practice of declining to address issues not ruled on below.

In any event, the immunity defense is frivolous. First, the Eleventh Amendment does not

apply to Ms. Lambert's claim for injunctive relief—including her demand for prospective monitoring. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102–03 (1984); *Ex parte Young*, 209 U.S. 123, 166–67 (1908).

Second, Respondent Hamilton County is obviously not a state and not part of state government. *See* Ohio Rev. Code Ann. § 2744.01(F). And Mr. Hartmann is not a state employee. Although a local official may be covered by Eleventh Amendment immunity if he is "sued simply for complying with state mandates that afford no discretion," *Brotherton v. Cleveland*, 173 F.3d 552, 566 (6th Cir. 1999), there was no Ohio law that required Mr. Hartmann to post Social Security numbers on a website—or to otherwise make them public. To the contrary, the Ohio Supreme Court has repeatedly held that a government official *must redact* Social Security numbers from records where an individual's right to privacy outweighs the government's interest in disclosure. *See Beacon Journal*, 640 N.E.2d at 169; *also State ex rel. WLWT-TV5 v. Leis*, 673 N.E.2d 1365, 1369 (Ohio 1997) (Social Security numbers "are exempt under R.C. 149.43(A)(1)"); *State ex rel. Wadd v. Cleveland*, 689 N.E.2d 25, 28 (Ohio 1998) (accident report may be disclosed only "following prompt redaction of exempt information such as Social Security numbers"); *State ex rel. Highlander v. Rudduck* 816 N.E.2d 213, 217 (Ohio 2004) (directing judge to "promptly make any appropriate redactions, e.g., Social Security numbers, before releasing the [divorce] records"); *State ex rel. Montgomery County Pub. Defender*

v. Siroki, 842 N.E.2d 508, 512 (Ohio 2006) (clerk of courts properly redacted Social Security from criminal records because "[r]evealing individuals' Social Security numbers that are contained in criminal records does not shed light on any governmental activity"). As is evident from this long list of cases, this principle is not, as Respondents suggest, a new wrinkle in Ohio law. *See* Opp. 3 & n.1. Simply put, had Mr. Hartmann been following Ohio law, he would have never publicized Ms. Lambert's Social Security number in the first place.

No doubt, that is why Respondents' immunity arguments have gotten no traction to date, in either the Court of Appeals or the District Court. The possibility that Respondents will nevertheless renew these arguments on remand—and that some court might be willing to consider them—is no basis for denying certiorari on the central and important issue that the courts below *did* decide.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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Supreme Court, U.S.
MOTION FILED
NOV 14 2008
William K. Suter, Clerk

111 (3)

No. 08-500

In the

Supreme Court of the United States

CYNTHIA LAMBERT,

Petitioner,

v.

GREG HARTMANN, Clerk of Courts for Hamilton County, and HAMILTON COUNTY BOARD OF COUNTY COMMISSIONERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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CONSUMER ACTION AND PRIVACY RIGHTS CLEARINGHOUSE'S MOTION FOR LEAVE TO FILE AND BRIEF AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR CERTIORARI

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MOTION FOR LEAVE TO FILE AND STATEMENT OF INTEREST[1]

Consumer Action and Privacy Rights Clearinghouse move under Rule 37.2(b) of this Court for leave to file the following *amicus* brief in support of the petition for certiorari. Consumer Action and Privacy Rights Clearinghouse file this motion because respondent Hamilton County has failed to respond to written and telephonic requests for consent to this filing.

Consumer Action is a national not-for-profit education and advocacy association devoted to protecting consumers from, among other things, the frequent crime of identity theft. Consumer Action has served consumers and sought to protect their rights nationwide for 37 years by aiding consumers in handling complaints, publishing educational materials in a variety of languages, and advocating for consumers in the media and before lawmakers. In particular, Consumer Action has sought to protect those most targeted by the unscrupulous: the disabled, those with low incomes, immigrants, and the elderly.

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[1] No party or counsel for a party has authored or contributed monetarily to the preparation or submission of any portion of this brief. On November 4, 2008, Consumer Action and Privacy Rights Clearinghouse provided all counsel of record with timely notice of its intention to file this *amicus* brief.

Privacy Rights Clearinghouse is a nonprofit consumer organization that serves individuals nationwide through both consumer information and advocacy. Privacy Rights Clearinghouse seeks to raise consumers' awareness of how technology affects personal privacy, as well as to document and respond to consumer complaints regarding breaches of privacy. Privacy Rights Clearinghouse has advocated for consumers' privacy rights in local, state, and federal public policy proceedings, including legislative testimony, regulatory agency hearings, task forces, and study commissions. It is also listed as a resource by the United States Department of Justice on the page of that department's website devoted to identity theft.

These two organizations have a common interest in this case: that some of the largest and most important keepers of confidential information—state and local governments—recognize the harm caused by intentional disclosures of private information and that they take steps to safeguard that information.

SUMMARY OF ARGUMENT

This Court should grant review of the Sixth Circuit's decision below, reported at 510 F.3d 433, because that decision not only conflicts with other circuits' decisions and Congressional action, but also leaves millions of residents within the Sixth Circuit without a meaningful remedy when they are the victims of predictable and preventable

identity theft. Further, this is an issue of significant importance to private citizens everywhere in this country.

ARGUMENT

I. THE CIRCUITS REQUIRE GUIDANCE TO RESOLVE A SIGNIFICANT SPLIT

Had Cynthia Lambert lived almost anywhere in the country outside the area covered by the Sixth Circuit, she would have been able to maintain an action under 42 U.S.C. § 1983 for Respondent Greg Hartmann's intentional violation of her informational privacy interest. As shown in Ms. Lambert's petition, the Second, Third, Fourth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits all apply a balancing test that does not additionally require that a "fundamental liberty interest" be implicated. *See* Pet. 10 (citing *Tucson Woman's Clinic v. Eden*, 379 F.3d 531 (9th Cir. 2004); *Alexander v. Peffer*, 993 F.2d 1348 (8th Cir. 1993); *Denius v. Dunlap*, 209 F.3d 944 (7th Cir. 2000); *Sheets v. Salt Lake County*, 45 F.3d 1383 (10th Cir. 1995); *Doe v. City of New York*, 15 F.3d 264 (2d Cir. 1994); *James v. City of Douglas*, 941 F.2d 1539 (11th Cir. 1991); *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990); and *Fraternal Order of Police v. City of Philadelphia*, 812 F.2d 105 (3d Cir. 1987)). Of the circuits that have addressed the issue, only the Sixth would without question deny Ms. Lambert recourse.

The split is especially significant because the circuits that disagree with the Sixth Circuit have also developed a variety of balancing tests for determining when someone's privacy rights have been violated. Pet. 12-14. Moreover, while the circuits' confusion alone would justify granting the petition, the type of data disclosure that happened here is a problem of significant proportions.

II. State and Local Government Disclosures of Confidential Information Are a Serious Problem

Good name in man and woman, dear my lord,

Is the immediate jewel of their souls:

Who steals my purse steals trash; 'tis something, nothing;

But he that filches from me my good name

Robs me of that which not enriches him

And makes me poor indeed.

William Shakespeare, Othello, act 3, sc. 3.

Identity theft allows the thief to have both the purse and the victim's good name, enriching the thief while impoverishing the victim. Aware of this, citizens are increasingly alert to the methods of identity theft and the devastating harms that result, and they have started to protect their confidential information accordingly. They do not, however, expect their own state and local governments to scuttle those safeguards by

disclosing the information they have sought to protect (and indeed that Congress has sought to protect).

There can be no doubt that identity theft continues to be a serious problem in this country. According to one recent study for the Federal Trade Commission ("FTC"), recent years have seen over 8.3 million adults in the United States become the victims of some form of identity theft, and the cost of those thefts is measured in the billions of dollars per year. Synovate, *Federal Trade Commission – 2006 Identity Theft Survey Report* (Nov. 2007). Consumer organizations deal with the messy aftermath of such identity theft every day. "Consumer Sentinel," the FTC's complaint database, indicates that for eight years in a row, identity theft is the issue about which consumers complain most often. In 2006 and 2007, well over 30% of all complaints related to identity theft. Federal Trade Commission, *Consumer Fraud and Identity Theft Complaint Data (January—December 2007)*, at 3 (Feb. 2008); Federal Trade Commission, *Consumer Fraud and Identity Theft Complaint Data (January—December 2006)*, at 3 (Feb. 2007). The next most frequently complained-about type of fraud is related to shop-at-home/catalog sales and constituted only about 7% of all complaints.

The dishonest do not need much more than a Social Security number to steal someone's identity. As the Fourth Circuit put it:

> [A]rmed with one's [Social Security number], an unscrupulous individual could obtain a person's welfare benefits, order new checks at a new address on that person's checking account, obtain credit cards, or even obtain a person's paycheck .... Succinctly stated, the harm that can be inflicted from the disclosure of a [Social Security number] to an unscrupulous individual is alarming and potentially financially ruinous.

Greidinger v. Davis, 988 F.2d 1344, 1354 (4th Cir. 1993).

Congress spoke to this concern when it passed the Intelligence Reform and Terrorism Prevention Act of 2004, which prevents states from listing citizens' Social Security numbers on drivers' licenses and state-issued identification cards. 42 U.S.C. § 405(c)(2)(C)(vi)(II). Here, however, the Hamilton County clerk provided much more when he publicly posted Ms. Lambert's name, address, date of birth, signature, *and* Social Security number for all (including thieves) to see and abuse.

Undoubtedly, some instances of identity theft are preventable. There is no shortage of websites and organizations—including that of the Consumer Action and Privacy Rights Clearinghouse—with the specific goal of reducing identity theft. But citizens,

diligent or otherwise, do not expect that their state and local governments will needlessly and intentionally disclose the information that they have sought to protect.

Sadly though, state and local governments do disclose consumers' private data. In the first three quarters of 2008, state and local governments exposed the confidential information of 3.8 million Americans. So while the federal government has become increasingly diligent in protecting citizens' confidential information, the same cannot be said of state and local governments. Indeed, breaches by state and local governments far outnumber breaches reported by federal agencies. In 2007, for example, the State of Ohio carelessly allowed the disclosure of the names and bank data of almost all its state employees and 125,000 other individuals when an unencrypted tape containing the data was taken from an intern's car. Mark Niquette, *Bank data on stolen tape*, The Columbus Dispatch (June 17, 2007).

Ohio is not alone.[2] This year Colorado has had a poor record at preventing confidential data from appearing on state websites. On July 10, 2008, the state Department of Motor Vehicles improperly allowed access to the Social Security numbers, addresses, and other personal information of 3.4 million Coloradans. Jessica Fender, *DMV puts*

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[2] Privacy Rights Clearinghouse maintains a database listing data breaches from 2005 to present at http://www.privacyrights.org/ar/ChronDataBreaches.htm.

Coloradans at risk of ID theft, Denver Post (July 9, 2008), http://origin.denverpost.com/headlines/ci_9822063. And just last month, Computerworld magazine discovered that the private data of executives at some of the country's largest companies, including Fortune 100 companies, were available on the Colorado Secretary of State's website. One of the documents provided the Social Security numbers, home addresses, and dates of birth of 93 top officers of a well-known financial corporation. Jaikumar Vijayan, *Colorado State Website Reveals Social Security Numbers of Top U.S. Executives* (Oct. 9, 2008), http://www.cio.com/453690/Colorado_State_Website_Reveals_Social_Secutiry_Numbers_Of_Top_U.S._Executives.

The problem of state and local government disclosure is so pervasive that Senator Norman Coleman of Minnesota recently introduced legislation that would allocate $25 million to determine how better state governments can safeguard personal data, including Social Security numbers. *See* State Cyber Security Protection Act of 2008, S. 3460, 110th Cong., § 2 (2008). Even more recently, the Government Accountability Office found that the practice of putting Social Security numbers online is common, occurring in roughly 85% of the largest counties around the country. *See* Government Accountability Office, *Social Security Numbers Are Widely Available in Bulk and Online, but Changes to Enhance Security Are Occurring*, GAO-08-1009R, at 1 (Sept. 4, 2008).

Many improvements in security are prospective only, however, leaving hundreds of thousands or millions of Social Security numbers online.

All of this demonstrates that what happened in Hamilton County in this case is not unique. Five or ten years ago experts predicted that as more personal information became available online, the need to protect such information would increase. That time is here—yet data and personal information are routinely posted online and exposed to the unscrupulous. Innocent citizens such as Petitioner no longer just face a theoretical risk of identity theft; they actually become the victims of identity theft. As the financial and credit crisis in this country becomes more acute, it will be more important for individuals to have control over their financial well-being. Even in the most stable times, identity thefts resulting from state and local government disclosures are individually destabilizing events. If state and local governments continue to disclose their citizens' confidential data with impunity, events that were destabilizing to individuals may become another factor further destabilizing an already shaky credit-driven economy. Put simply, this is an issue whose time has come.

Of course, not all disclosures of personal identifying information are actionable under Section 1983, but this case illustrates the problem resulting from intentional disclosures. The county clerk here left confidential personal information

online for months, giving would-be-defrauders plenty of time to sift through the information and identify the most vulnerable targets. Absent remedies for intentional disclosures, states and local governments may have little motivation to properly protect their citizens' confidential information.

CONCLUSION

Allowing the Sixth Circuit's decision to stand leaves millions of Americans in that circuit unprotected and at a greater risk of identity theft as compared to their fellow citizens. This Court should resolve whether Section 1983 provides an effective remedy so that more victims like Ms. Lambert are not created at the hands of the governmental bodies that are supposed to protect them.

The petition for a writ of *certiorari* should be granted.

RESPECTFULLY SUBMITTED this 14th day of November, 2008.

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